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The recast Reception
Conditions Directive:
Central Themes,
Problem Issues,
and Implementation
in Selected Member States

Paul Minderhoud & Karin Zwaan (eds)

THE RECAST RECEPTION CONDITIONS DIRECTIVE:
CENTRAL THEMES, PROBLEM ISSUES, AND IMPLEMENTATION
IN SELECTED MEMBER STATES

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Preface

The presentations on which this book is based, were originally given during a Centre for Migration Law (Jean Monnet Centre of Excellence) seminar on the recast Reception Conditions Directive (Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), OJEU 2013 L180/96). This seminar took place in Nijmegen, at the Centre for Migration Law, Faculty of Law of the Radboud University, on Tuesday 8 December 2015.

We publish a book on the results of this seminar in order to enable those who were unable to attend to benefit from the wealth of knowledge and information which was shared during the seminar.

We would like to thank all the participants in the seminar, and especially the speakers – Lienneke Slingenberg, Lilian Tsourdi, Karina Franssen, Liam Thornton, Caroline Lantero, Tomosz Dubowski, Mieczysława Zdanowicz, Claudia Pretto, Simone Penaso, Vassilis Avdis, Max Pichl, Madeline Garlick – for giving their permission to publish their lectures in this book. Also included in the book is a contribution of Valeria Ilareva, on the implementation of the Reception Conditions Directive in Bulgaria.

The seminar and this publication would not have been possible without Jean Monnet funding.

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PROLOGUE

Prologue

Paul Minderhoud & Karin Zwaan

On 20 July 2015, the deadline for the transposition of the Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection (RRCD, recast Reception Conditions Directive, Reception Conditions Directive)¹ expired. In September 2015 the Commission sent letters of formal notice to 19 Member States² for not having communicated the national measures taken to fully transpose the Reception Conditions Directive.³

This book highlights the central themes, problem issues and implementation of the recast Reception Conditions Directive. The purpose of this Directive 2013/33 (also referred to as RRCD) is, as Article 1 explains, to lay down standards for the reception of applicants for international protection ('applicants') in Member States.

The book is divided in two sections, and starts with this Prologue. The first section, containing 4 contributions deals with the central themes and the problem issues of the Reception Conditions Directive. The second part of the book focuses on the implementation of the Reception Conditions Directive in a selected number of Member States. Contributions on the implementation or non-implementation in Bulgaria, France, Germany, Greece, Italy and Poland are included. The book ends with an Epilogue.

In the first chapter of the first section, Slingenberg gives an overview of the Directive. She deals with the legal basis and the establishment of Directive 2013/33 and gives an overview of the content of the Directive. She discusses the main provisions by analysing their legal implications. Slingenberg presents some of the issues which were already controversial during the negotiations and which have been contentious during its implementation in some Member States. Also she addresses the possible limits of the RRCD, especially with a view to dealing with high numbers. As a result of these high numbers, the systems meant for the reception of asylum seekers in many Member States are under increasing pressure. Slingenberg points out that as a reaction to these developments, Member

¹ OJEU 2013 L180/96.

² Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Germany, Estonia, Greece, Spain, France, Hungary, Lithuania, Luxembourg, Latvia, Malta, Poland, Romania, Sweden, Slovenia.

³ European Commission – Press Release, *More Responsibility in managing the refugee crisis: European Commission adopts 40 infringement decisions to make European Asylum System work*, Brussels, 23 September 2015, http://europa.eu/rapid/press-release_IP-15-5699_en.htm.

States have started pursuing more restrictive policies with regard to the reception of asylum seekers.

The negotiations on the recast of the Reception Conditions Directive were closely followed by Tsourdi. She describes in her contribution how the recast Reception Conditions Directive was the result of intense negotiations. Some of the thorniest issues during the negotiations of that instrument were: access to employment and to vocational training, the scope of application of the instrument and exceptions to the principle of freedom of movement. The 2003 Directive established minimum standards covering different aspects of the rights and treatment of asylum like material reception conditions, healthcare and access to employment. Her contribution focuses on the issue of the impact of the negotiations on the recast instrument. It maps out the cumbersome adoption process, outlining the institutional dynamics. A final section critically reflects on the level of harmonization achieved in the recast instrument, its adherence with fundamental rights, as well as the nature of the main challenges in this area.

Franssen, in her article, deals with two important topics, namely the detention of vulnerable persons and persons with special reception needs. In her contribution she addresses first the provisions on vulnerable persons with special reception needs and then looks into the detention provisions. By doing so, Franssen demonstrates that it is rather odd to have special provisions for vulnerable persons with special reception needs while at the same time the Directive still allows for the detention of vulnerable persons.

In the chapter of Thornton, he gives the reader a view from outside the EU Reception acquis. Only indirectly impacted by common European Union reception standards, Ireland presents an interesting case study on the reception rights for asylum seekers. The legal obligations upon Ireland as regards reception conditions for applicants for international protection, who are not subject to detention, are dominated by domestic regulations. Ireland does not have any obligations under either the Reception Conditions Directive 2003 or the recast Reception Conditions Directive 2013.

The second part of the book starts with an article on the implementation of the Directive in France. Lantero describes the French implementation process, and the effects of the legislation on the reception conditions. She indicates that the French transposition in some cases is quite minimalistic and gives insight in the reception conditions situation in Calais.

The implementation of the recast Reception Condition Directive in Poland is highlighted by Zdanowicz and Dubowski. The main developments in Polish law with regard to the transposition of the RRCD refer to the following areas covered by the Directive: issues of documentation, problems of applicant's detention, questions of material reception conditions (including modalities, reduction and withdrawal thereof) and position of vulnerable persons and minors.

In the contribution of Pretto and Penasa on Italy they describe that the Italian reception system is composed of three different reception facilities: the first reception centres: after the arrival by sea or the entry into the national territory; the second reception facilities: upon arrival, asylum seekers and migrants may

be placed in temporary emergency centres managed by local Prefectures and the third category of centres consists of centres of reception with specific projects of integration. They also focus on the 'hotspots approach', based on the establishment of centres equipped to temporarily host and identify migrants, and on its legal deficiencies in terms of both legal basis and effective implementation.

Avdis discusses the implementation of the RRCD in Greece. Over the past years the Greek asylum system, particularly concerning reception conditions for asylum seekers, has constantly been subject to strong criticism and Greece has been repeatedly condemned for failure to provide adequate reception conditions and acceptable detention conditions. He indicates that to date, the Reception Conditions Directive (recast) has not been transposed into national legislation. The Government has prepared a draft law, made public at the end of December 2015, which transposes the provisions of the Directive concerning detention. More specifically, with the new proposed legislation, Articles 8 to 11 of the Directive will be transposed in the same legislative text with provisions regulating the asylum procedure and transposing the Asylum Procedures Directive (recast).

In Germany the recasts of the Reception Conditions Directive and the Procedure Directive were not implemented in German asylum law and the current government is not willing to change regulations from which refugees could benefit. During the negotiations the government was trying to Europeanize the regulations from the German asylum system and therefore no fundamental change in German reception structures was desired, as can be read in the chapter by Pichl.

Ilareva introduces in her contribution the main changes which were brought to the Bulgarian legislation in connection with transposition of the RRCD. In the process of transposition of the RRCD Bulgaria amended its national asylum law to introduce for the first time the possibility of detention of asylum seekers as of 01 January 2016. Until that moment the Bulgarian legislation had not formally envisaged detention of asylum seekers, but in practice asylum seekers have been detained as irregular immigrants. Detention happens under the Return Directive 2008/115/EC prior to giving asylum seekers access to the asylum procedure. Therefore, the new detention regime under the asylum law (Directive 2013/33) will complement the period of detention of asylum seekers, which starts to run under the regime of immigration law (Directive 2008/115). The interaction and the differentiation of the two distinct legal regimes of detention of persons who seek asylum is the focus of her chapter.

The book ends with an Epilogue by Garlick, in which she describes that the provision of adequate reception conditions to those seeking international protection is an essential part of ensuring respect for the right to asylum. People claiming to fear persecution or serious harm may be refugees or otherwise in need of protection, and as such, are entitled to protection under international law, even before their status is recognised in a domestic asylum procedure. Reception in accordance with recognised international standards is also necessary to ensure access to the asylum process: people claiming to fear persecution or serious harm will

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only be in a position effectively to pursue their applications if their basic needs are met, including to shelter and subsistence, but also essential medical care and attention to special needs. As such, the availability of reception conditions may determine the extent to which a State is in a position to fulfil its protection obligations. Garlick argues that the growth in asylum-seeker numbers in many Member States, and the accompanying sense of 'crisis' across the EU as a whole, appears to have rendered that challenge even more demanding than in the past.

PART 1: CENTRAL THEMES AND PROBLEM ISSUES

1. Reception Conditions Directive (recast): Relevance in Times of High Numbers of Asylum Applications

Lieneke Slingenberg

1. INTRODUCTION

Since 2012, the European Union has been faced with an increase in asylum applications. In 2014, the total number of asylum applications¹ remained (just) below the total number of asylum applications submitted in 1992,² which was hitherto the peak year of submitted asylum applications in the EU. In 2015, 1,3 million asylum applications were submitted in the EU,³ which is almost double the number of 1992. As a result of these high numbers, the systems meant for the reception of asylum seekers in many Member States are under increasing pressure.⁴

As a reaction to these developments, Member States have started pursuing more restrictive policies with regard to the reception of asylum seekers. Asylum seekers have had to live in sports facilities or tent camps for prolonged periods of time⁵ or were offered no accommodation at all;⁶ cash benefits were replaced by benefits in kind;⁷ and children had to wait for months before they received access to education.⁸ Some of these policies were caused by force majeure, whereas other policies were explicitly intended to deter asylum seekers.

¹ In 2014, 627.780 asylum applications were submitted in the EU. Source: Eurostat.

² In 1992, 672 thousand asylum applications were submitted in the, then, 15 Member States of the EU. Source: Eurostat.

³ Source: Eurostat.

⁴ This pressure is not the same in all Member States; some Member States have received a much higher number of asylum applications than others. E.g. in 2015, Germany received 476,620 asylum applications, which is 35% of the total number of asylum applications submitted in the EU. Hungary received 177,135 asylum applications, a share of 13,9%. Estonia, Croatia, Latvia, Lithuania, Portugal, Slovenia, Slovakia, Iceland and Liechtenstein all received less than 1,000 asylum applications in 2015. Source: Eurostat.

⁵ See e.g. for the Netherlands: *Kamerstukken II*, 2015/16, 32 317/34 215, nr. FD.

⁶ See e.g. for Greece: Asylum Information Database, *Country Report Greece*, November 2015, p. 74, available at: http://www.asylumineurope.org/sites/default/files/report-download/aida_gr_update.iv_.pdf.

⁷ See e.g. for Germany: Asylum Information Database, *Country Report Germany*, November 2015, p. 50-51, available at: http://www.asylumineurope.org/sites/default/files/report-download/aida_de_update.iv_o.pdf; for Finland: Government Action Plan on Asylum Policy, 8 December 2015, available at: http://valtioneuvosto.fi/en/article/-/asset_publisher/hallitus-julkisti-turvapaikkapoliittisen-toimenpideohjelmansa?_101_INSTANCE_3qmUeJglxZEK_groupId=10616.

⁸ See e.g. for the Netherlands: *Kamerstukken II*, 2015/16, 34 334, nr. 3; and for the UK: 'Children seeking asylum in UK denied access to education', *The Guardian* 2 February 2016,

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When adopted in 2003, the EU Reception Conditions Directive was primarily a confirmation of existing policies in the (then 15) Member States. In the light of the latest developments with regard to the reception of asylum seekers, the (recast) Directive has gained renewed relevance: in determining the limits of restrictive policies; in establishing budget priorities; and in putting an end to a possible race to the bottom amongst Member States trying to be the least attractive for new asylum seekers. In this contribution, the relevance of the Directive in times of high numbers of asylum applications will be further examined.

In doing this, this contribution will focus on three issues. First, since the Directive provides for a subjective right to housing, food, clothing and a daily expenses allowance for asylum seekers, it is important to establish the precise personal scope of the Directive. From which moment in time are Member States obliged to provide asylum seekers with these facilities? And do these obligations end if the asylum application is rejected and/or if the Member State is not responsible for examining the asylum application (para. 3)? A second relevant question is to what extent the Directive leaves room for exceptions on the basis of high numbers of asylum applications or saturation of reception networks (para. 4). Thirdly, since in many Member States the length of the asylum procedure increases due to the large number of asylum applications, this chapter examines to what extent the Directive provides for an increase of rights through the mere passage of time (para. 5). First, the background of the Directive will be briefly outlined (para. 2).

2. BACKGROUND

The need to harmonize the standards on the reception of asylum seekers in EU Member States arose in the nineties of the last century in the context of an increasing number of asylum seekers arriving in the European Union. The European Commission urged Member States to harmonize their reception conditions for asylum seekers in order to prevent 'secondary movements' of asylum seekers, i.e. movements towards the Member State with the most generous conditions.⁹ At that time, all the (then 15) EU Member States had exclusionary aspects to their rules on the reception of asylum seekers,¹⁰ in order to deter potential

available at: <http://www.theguardian.com/society/2016/feb/02/children-seeking-asylum-in-uk-denied-access-to-education>.

⁹ Communication from the Commission to the Council and the European Parliament on the right of asylum', Brussels 11 October 1991, SEC(91)1857 final, p 7.

¹⁰ D. Mabbett and H. Bolderson, 'Non-Discrimination, Free Movement, and Social Citizenship in Europe: Contrasting Provisions for EU Nationals and Asylum-Seekers', in: R. Sigg and C. Behrends (eds), *Social Security in the Global Village*, New Brunswick/London: Transaction Publishers 2002, p. 205. See also R. Bank, 'Reception Conditions for Asylum Seekers in Europe: An Analysis of Provisions in Austria, Belgium, France, Germany and the United Kingdom', 69 *Nordic Journal of International Law* 2000, p. 259.

asylum seekers and stimulate voluntary return of rejected asylum seekers,¹¹ but the content and scope of the exclusionary measures differed greatly.

In 1999, the European Council decided in Tampere to work towards the establishment of a Common European Asylum System (CEAS) including, in the short term, 'common minimum conditions of reception of asylum seekers'.¹² As one of the first components of the CEAS, Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers was adopted on 27 January 2003.¹³ This directive deals with different aspects of the reception of asylum seekers, such as restrictions of freedom and detention, schooling, employment, material reception conditions, health care and special needs of vulnerable asylum seekers. In a green paper on the future of the CEAS the Commission noted that the wide margin of discretion left to Member States by several key provisions of this directive resulted in negating the desired harmonization effect. In addition, this wide margin of discretion has led to the establishment of low reception standards, according to the Commission.¹⁴

The Tampere conclusions provided for two phases for the development of the CEAS. Whereas in the short term, common minimum standards had to be adopted, in the longer term, 'Community rules should lead to a common asylum procedure and a uniform status for those who are granted asylum valid throughout the Union'.¹⁵ As part of the second phase of the CEAS, the Commission issued a proposal for a recast of Directive 2003/9 in December 2008, aimed at ensuring a higher degree of harmonization and better standards of protection.¹⁶ In May 2009, the European Parliament adopted its position on the proposal which approved most of the proposed amendments.¹⁷ The Council documents on this

¹¹ R. Bank, 'Reception Conditions for Asylum Seekers in Europe: An Analysis of Provisions in Austria, Belgium, France, Germany and the United Kingdom', 69 *Nordic Journal of International Law* 2000, p. 286-287; A. Bloch and L. Schuster, 'Asylum and Welfare: Contemporary Debates', 22 *Critical Social Policy* 2002, p. 401; M. Liedtke, 'National Welfare and Asylum in Germany', 22 *Critical Social Policy* 2002, p. 494; P.E. Minderhoud, 'Asylum Seekers and Access to Social Security: Recent Developments in The Netherlands, United Kingdom, Germany and Belgium', in: A. Bloch and C. Levy (eds), *Refugees, Citizenship and Social Policy in Europe*, London: MacMillan Press 1999, p. 146; S. Rosenberger and A. König, 'Welcoming the Unwelcome: The Politics of Minimum Reception Standards for Asylum Seekers in Austria', *Journal of Refugee Studies* 2011, p. 1.

¹² Tampere European Council 15 and 16 October, Presidency Conclusions, available at: http://www.europarl.europa.eu/summits/tam_en.htm#.

¹³ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, *OJ* 31/18.

¹⁴ European Commission, *Green Paper on the future Common European Asylum System*, COM(2007) 301 final.

¹⁵ Since the entry into force of the Treaty of Lisbon on 1 December 2009, this aim has been laid down in article 78 of the Treaty on the Functioning of the European Union (TFEU).

¹⁶ European Commission, *Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (recast)*, COM(2008) 815 final.

¹⁷ EP-PE_TC1-COD(2008)0244.

proposal reveal, however, that the proposed changes encountered opposition from a significant number of Member States and no agreement was reached on this proposal. Delegations wanted 'a better balance between, on the one hand, high standards of reception conditions for applicants for international protection and, on the other hand, the administrative and financial implications for Member States'.¹⁸

The Commission presented a modified proposal for a recast of Directive 2003/9 in June 2011.¹⁹ The Commission put forward that this modified proposal granted Member States more flexibility and latitude and better ensured that Member States have the tools to address cases where reception rules are abused and/or become pull factors. After difficult negotiations, Directive 2013/33 (hereafter: the Directive) was formally adopted on 26 June 2013 and entered into force upon its publication on 29 June 2013.²⁰ Member States had to implement this Directive into their national laws before 21 July 2015.²¹ Due to the difficult negotiations in Council, the differences between Directive 2003/9 and Directive 2013/33 are, with the exception of the provisions on detention, rather modest.²²

3. PERSONAL SCOPE OF THE DIRECTIVE

3.1 Introduction

Since the coming into force of Directive 2003/9/EC, Member States have been obliged to provide asylum seekers who fall under the Directive's personal scope with housing, food, clothing, ('material reception conditions') and health care.²³ Member States can provide these facilities in kind, as financial allowances, in vouchers, or a combination of the three.²⁴ Besides these provisions, Member States need to provide asylum seekers with a daily expenses allowance.²⁵ The

¹⁸ Council document 6394/1/12 REV 1, ASILE 24, at 1.

¹⁹ European Commission, *Amended proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (recast)*, COM(2011) 320 final.

²⁰ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), *OJ L80/96*.

²¹ The Directive does not apply to the United Kingdom, Ireland and Denmark. For the United Kingdom, Directive 2003/9 will continue to apply.

²² See further chapter 2 of this book. See also S. Peers, 'Statewatch analysis. The EU Directive on Reception Conditions: A weak compromise' July 2012, available at: <http://www.statewatch.org/analyses/no-184-reception-compromise.pdf>.

²³ Arts. 13(1) in conjunction with Art. 2(j) and Art. 15(1) of Directive 2003/9/EC; Art. 17(1) in conjunction with Art. 2(g) and Art. 19 of Directive 2013/33/EU.

²⁴ Art. 13(5) of Directive 2003/9/EC; Art. 2(g) of Directive 2013/33/EU.

²⁵ Art. 2(j) of Directive 2003/9/EC; Art. 2(g) of Directive 2013/33/EU. See about the obligation to provide a daily expenses allowance: K. Groenendijk and L. Slingenberg, 'Niet bij brood →

Directive contains an exhaustive list of grounds for reduction or withdrawal of reception benefits e.g. if an asylum seeker does not comply with reporting duties, abandons the place of residence determined by the competent authority without informing it, or breaches the rules of the accommodation centre.²⁶ Due to the fact that this list is exhaustive, Member States are no longer free to deny assistance to categories of asylum seekers of their own choosing. These basic obligations for Member States have not been changed by the recast Directive. They provide for an important subjective right for asylum seekers; the right to be provided with (some kind of) housing, food, clothing, health care and a daily expenses allowance.

It is, therefore, important to know who falls under the personal scope of the Directive and is entitled to these provisions. Who is an asylum seeker? As from which moment are Member States obliged to provide these facilities? From the moment an asylum seeker sets foot on the territory? Or once his asylum application has been registered by the authorities? And until what moment do the obligations apply in case the application is rejected? Until the final appeal is unsuccessful? This section will try to answer these questions.

Article 3(1) of the Directive reads:

This Directive shall apply to all third-country nationals and stateless persons who make an application for international protection on the territory, including at the border, in the territorial waters or in the transit zones of a Member State, as long as they are allowed to remain on the territory as applicants, as well as to family members, if they are covered by such application for international protection according to national law.

For the definition of an 'application for international protection' the Directive refers to Article 2(h) of Directive 2011/95/EU.²⁷ Accordingly, both applicants for refugee status and applicants for subsidiary protection fall under the scope of the Directive. This is an important change with regard to Directive 2003/9/EC which contained the possibility to exclude applicants for subsidiary protection.²⁸ Another difference with Directive 2003/9 is that Article 3 of Directive 2013/33 explicitly refers to applications made in the territorial waters or in the transit zone of Member States. Such applications also fall under the Directive's personal scope. An 'applicant' is defined as 'a third-country national or a stateless person who has made an application for international protection in respect of which a final decision has not yet been taken'.²⁹ Hence, in order to fall under the scope of Directive 2013/33, three important conditions have to be fulfilled:

alleen. Onthouden dagvergoeding aan asielzoekers in noodopvang is onwettig', *A&MR* 2016, no. 2.

²⁶ Art. 16 of Directive 2003/9/EC; Art. 20 of Directive 2013/33/EU.

²⁷ Art. 2(a) Directive 2013/33/EU.

²⁸ Art. 2(b) and Art. 3(4) of Directive 2003/9/EC.

²⁹ Art. 2(b) of Directive 2013/33/EU.

1. An application for international protection must have been made;
2. No final decision must have been taken on this application; and
3. The applicant must be allowed to remain on the territory.³⁰

The Directive does not contain definitions of the terms used in these conditions. However, as part of the CEAS, the Directive needs to be interpreted in conformity with the other instruments of the CEAS. Especially the recast of the Asylum Procedures Directive³¹ clarifies the meaning of these conditions. This (sometimes still rather unclear) meaning will be discussed in the following sections.

3.2 Making, Registering or Lodging an Application

An important question with regard to the Directive's personal scope is from which moment in time are Member States obliged to provide asylum seekers with reception conditions? From the moment they state their intention to apply for asylum to the authorities, from the moment they are registered as asylum seekers, or from the moment they have formally lodged their asylum application? In some Member States, state benefits are only provided to asylum seekers once they are registered as asylum seekers. When there are large numbers of simultaneous asylum applications, there is not always enough capacity to register them all. In such cases, asylum seekers sometimes have to wait for weeks before they are provided with state benefits.³² This illustrates that it is important to know the precise moment when Member States' obligations to provide benefits to asylum seekers become activated.

According to the English-language version, the Directive applies to third-country nationals and stateless persons who *make* an application for international protection. Other articles in this version of the Directive use the term *lodge*. For example, Article 5 on the right to information contains a time limit of 15 days after an application is *lodged*.³³ Also the French language version uses different terms in Article 3 (*présentent une demande de protection*) and Article 5

³⁰ This latter condition is also explicitly mentioned in the preamble of Directive 2013/33. Recital 8 holds: 'In order to ensure equal treatment of applicants throughout the Union, this Directive should apply during all stages and types of procedures concerning applications for international protection, in all locations and facilities hosting applicants and *for as long as they are allowed to remain on the territory of the Member States as applicants*' (emphasis added).

³¹ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), *OJ* L180/60.

³² See for example Asylum Information Database, *Country Report: Germany*, November 2015, p. 49, available at: <http://www.asylumineurope.org/reports/country/germany>; European Council of Refugees, 'Belgium restricts access to protection and leaves hundreds of asylum seekers without shelter', 4 December 2015, available at: <http://www.ecre.org/component/content/article/70-weekly-bulletin-articles/1308-belgium-restricts-access-to-protection-and-leaves-hundreds-of-asylum-seekers-without-shelter.html>.

³³ Other examples of provisions that use the term *lodge* are Arts 6, 14 and 15.

(*l'introduction de leur demande de protection*). Other language versions use the same word in Articles 3 and 5, but use present tense in Article 3 and past tense or present perfect in Articles 5 and 6.³⁴ This indicates that in order to fall under the personal scope of the Directive, it is not necessary to officially *have lodged* the application in conformity with national law.

The question remains, however, which moment in time is then decisive for activating Member States' obligations under the Directive. The moment an asylum seeker sets foot on the territory and states his intention to apply for international protection to the authorities? Or only after a first registration has taken place? The Asylum Procedures Directive contains some indications for this latter interpretation. Article 6 of this Directive distinguishes between making, registering and lodging an asylum application. There are strict time limits for the registration of applications. Three working days after an asylum application has been made to the competent authorities, the application should be registered.³⁵ This deadline is six working days if the application is made to other authorities which are likely to receive such applications, but not competent for the registration under national law.³⁶ Where a large number of simultaneous applications for international protection make it very difficult in practice to respect these time limits, Member States may provide for an extension of the registration deadline to 10 working days.³⁷ Registration of the application is not the same as lodging the application, as Article 6 also provides that Member States must ensure that a person who has made an application for international protection has an effective opportunity to lodge it as soon as possible.³⁸ Member States may require that applications should be lodged in person and/or at a designated place.³⁹

Registration of the application is not mentioned in other provisions of the Asylum Procedures Directive, nor in the Dublin Regulation or the Reception Conditions Directive and seems, therefore, not to have any legal effect. The strict registration time limits for Member States and the possibility of extending these time limits in case of large numbers of applications, however, suggest otherwise. If registration of the application had no legal effect, then the moment of registration would be irrelevant. Arguably, therefore, Member States are only obliged to provide reception conditions to asylum seekers once asylum seekers have registered their application. Depending on the situation and the competence of the authorities to whom an asylum seeker has stated his intention to apply for asylum, the maximum waiting period between stating this intention and its registration is 3 to 10 working days. An interpretation of the personal scope of the Reception Conditions Directive in conformity with Article 6 of the

³⁴ For example, the Dutch language version uses *indienen* in Art. 3, *de indiening* in Art. 5 and *ingediend is* in Art. 6. The Spanish language version similarly uses *presenten* in Art. 3, *hayan presentado* in Art. 5 and *la presentación* in Art. 6.

³⁵ Art. 6(1) of Directive 2013/32/EU.

³⁶ *Idem*.

³⁷ Art. 6(5) of Directive 2013/32/EU.

³⁸ Art. 6(2) of Directive 2013/32/EU.

³⁹ Art. 6(3) of Directive 2013/32/EU.

Asylum Procedures Directive, therefore, would be that asylum seekers fall under the personal scope as soon as their application is registered, and in any case no later than 3, or, depending on the situation, 6 or 10 working days after they have stated their intention to apply for asylum to the (competent) authorities.

In order to fall under the Directive's personal scope it is not necessary to make the application to the authorities of the Member State *responsible* for the examination of that application under the Dublin Regulation. In the first judgment on Directive 2003/9,⁴⁰ the Court of Justice of the European Union (CJEU) ruled that Directive 2003/9 applies as soon as an application for asylum is first submitted⁴¹ to a Member State; not only once it is submitted to the authorities of the Member State responsible for the examination of that application. This has not been changed by the recast Directive and recast Dublin Regulation.

3.3 Final Decision

The first condition of the Directive's personal scope deals with the start of Member States' obligations. The other two conditions deal with the end of it. An asylum seeker only falls under the personal scope of the Directive as long as no final decision on his application has been taken. An important question, therefore, is what is considered to be a 'final decision' in the context of the Directive. The Directive does not contain a definition of this term. The Asylum Procedures Directive defines 'final decision' as a 'decision on whether the third-country national or stateless person be granted refugee or subsidiary protection status by virtue of Directive 2011/95/EU and which is no longer subject to a remedy within the framework of Chapter V of this Directive, irrespective of whether such remedy has the effect of allowing applicants to remain in the Member States concerned pending its outcome'.⁴² Chapter V of the Asylum Procedures Directive deals with appeal procedures and contains the right to an effective remedy. According to Article 46(1) of this chapter, asylum seekers have the right to an effective remedy before a court or tribunal against decisions taken on their application. This chapter does not contain a right to a remedy in two instances. A restrictive reading of the term 'final decision' would therefore be that a final decision has been taken if a court or tribunal, of first instance, has reviewed the decision of the authorities on the application for asylum or if the asylum seeker has not made use of a possible appeal against this decision. In this reading, asylum seekers who appeal to a higher national court or authority do not fall under the scope of the directive. A wider reading of the term 'final decision' is also possible. In that case 'a remedy within the framework of Chapter V' of the Asylum Procedures Directive should be understood more broadly and 'final decision' would mean a decision without further appeal. In that case, a decision on the asylum application should only be considered 'final' if all domestic remedies have been ex-

⁴⁰ CJEU 27 September 2012, C-179/11 (*Cimade and GISTI*).

⁴¹ The CJEU did not clarify the difference between 'lodging' and 'making' an application.

⁴² Art. 2(e) Directive 2013/32/EU.

hausted. This latter interpretation would solve problems of interpretation when the higher court refers back to the court of first instance.

In the context of 'Dublin' procedures, when a Member State calls upon another Member State to take charge of or to take back an asylum seeker, the CJEU has ruled that only the actual transfer of the asylum seeker by the requesting Member State brings an end to the examination of the application for asylum in that Member State and should therefore be seen as the 'final decision'. The CJEU ruled this in a case about Directive 2003/9/EC and based this interpretation on the general scheme and purpose of this Directive and on the observance of human rights.⁴³ This wide interpretation by the CJEU of the term 'final decision' in the context of Dublin procedures is an argument in favour of the wider reading of this term in general.

Since international courts or committees are clearly not remedies within the framework of the Procedures Directive, and no 'appeal' can be lodged against national decisions with these bodies, asylum seekers who have exhausted domestic remedies and who lodge a complaint with an international court or committee have received a 'final decision' on their asylum application and, consequently, do not fall under the personal scope of the directive.

3.4 Allowed to Remain on the Territory

A final condition that needs to be fulfilled in order to fall under the personal scope of the Directive is to be allowed to remain on the territory. Again, the Directive does not contain further provisions on this condition. According to Article 2(p) of the Asylum Procedures Directive, 'remain in the Member State' means 'to remain in the territory, including at the border or in transit zones, of the Member State in which the application for international protection has been made or is being examined'. Hence, the border and the transit zone of an airport must be considered to form part of a Member State's territory. The question remains, however, as to when an asylum seeker is 'allowed' to remain on the territory. To answer this question, a distinction should be made between the procedure in first instance and the appeal procedure.

Pursuant to Article 9(1) of the Asylum Procedures Directive, an asylum seeker is allowed to remain in the Member State until the determining authority has made a decision in accordance with the procedures at first instance set out in Chapter III. Chapter III of the Asylum Procedures Directive contains rules and guarantees for different kind of procedures and applications, such as accelerated procedures, inadmissible and unfounded applications, subsequent applications and border procedures. Accordingly, asylum seekers are allowed to remain on the territory, and fall under the personal scope of Directive 2013/33, in all these situations, until a decision in first instance has been taken. The CJEU confirmed in *Arslan* that an asylum seeker has the right to remain in the territory of the

⁴³ CJEU 27 September 2012, C-179/11 (*Cimade and GISTI*), paras 51-58.

Member State concerned 'at least until his application has been rejected at first instance'.⁴⁴

Article 9(2) of the Asylum Procedures Directive states, however, that Member States may make an exception to the right to remain where they will surrender or extradite an asylum seeker or where an asylum seeker makes a subsequent application referred to in Article 41. Article 41(1) stipulates that Member States may make an exception from the right to remain on the territory where an asylum seeker:

- a) has lodged a first subsequent application, which is not further examined pursuant to Article 40(5), merely in order to delay or frustrate the enforcement of a decision which would result in his or her imminent removal from that Member State; or
- b) makes another subsequent application in the same Member State, following a final decision considering a first subsequent application inadmissible pursuant to Article 40(5) or after a final decision to reject that application as unfounded.

In addition, this article provides that Member States may make such an exception only where the determining authority considers that a return decision will not lead to direct or indirect *refoulement* in violation of that Member State's international and Union obligations. A subsequent decision that is not further examined will be considered inadmissible pursuant to Article 40(5). Since an inadmissibility decision is a decision in first instance, the end of the right to remain on the territory seems to follow directly from Article 9(1) of the Asylum Procedures Directive. Article 41(1)(a) seems therefore to be rather superfluous for this stage of the procedure.⁴⁵ The exception mentioned in Article 41(1)(b) is of relevance for this stage. This provision stipulates that Member States may deny the right to remain to asylum seekers who make a further subsequent application, following a subsequent application that has been declared inadmissible or unfounded, irrespective of whether that further subsequent application will be further examined or not. This means that asylum seekers who make a third or further asylum application in the same Member State, after their second application has been declared inadmissible or unfounded, do not have the right to remain on the territory pending the decision in first instance on their application and consequently, do not fall under the personal scope of Directive 2013/33/EU.

The Asylum Procedures Directive also provides for a right to remain on the territory pending the appeal procedure. On the basis of Article 46(5-8) of the Asylum Procedures Directive, asylum seekers who lodge an appeal against the

⁴⁴ CJEU 30 May 2013, C-534/11 (*Arslan*), para 48.

⁴⁵ As Art 9(1) only obliges Member States to allow asylum seekers to remain on the territory 'until the determining authority has made a decision in accordance with the procedures at first instance set out in Chapter III'. An inadmissibility decision on the basis of Article 40 is such a decision.

rejection of their application generally have the right to remain on the territory pending the outcome of the remedy or, in certain specified cases, until a court or tribunal has ruled whether or not the applicant may remain on the territory pending this period. This latter rule applies for example when an application is declared inadmissible or manifestly unfounded in an accelerated asylum procedure. Under certain circumstances, Member States may derogate from this latter right to remain in the case of a (further) subsequent application. The same conditions apply as with regard to the possibility to derogate from the right to remain with regard to subsequent applications pending the procedure in first instance.⁴⁶ This means that generally, asylum seekers who lodge an appeal against the rejection of their application must be allowed to remain on the territory until a court or tribunal has considered, at least, their request to stay on the territory pending the outcome of their appeal. Only in case of a subsequent application that is merely lodged in order to delay or frustrate the enforcement of a decision which would result in his or her imminent removal from that Member State and that will not be further examined or in case of a further subsequent application, after the first subsequent application is declared inadmissible or unfounded, asylum seekers do not have the right to remain on the territory pending this court procedure, and will not, therefore, fall under the personal scope of Directive 2013/33/EU.

3.5 Concluding Remarks

All of the above means that a number of categories of asylum seekers who are still awaiting a (court) decision on their asylum application do not fall under the personal scope of Directive 2013/33. First of all, it could be argued that asylum seekers who have only stated their intention to apply for asylum to the authorities but who have not yet been registered as such by the authorities, while the authorities did not yet exceed the registration deadline, do not yet fall under the Directive's personal scope. Secondly, Member States may choose to exclude two categories of asylum seekers from the right to remain on their territory pending the procedure in first instance and, consequently, from the personal scope of Directive 2013/33. These two categories are asylum seekers who lodge a further subsequent application after their second asylum application has been declared inadmissible or unfounded and asylum seekers who will be surrendered or extradited. Thirdly, a court or tribunal may rule on (and, hence, may deny) the right to remain on the territory during the appeal stage in certain specified circumstances.⁴⁷ Finally, asylum seekers who lodge a complaint with an international court or committee, or, arguably, who lodge a further domestic appeal against the rejection of their application do not fall under the personal scope of Directive 2013/33, since they have already received a 'final decision' on their application.

The *Cimade and GISTI* case indicates that the CJEU might give a broader definition of the Directive's personal scope. As mentioned earlier, the CJEU held in

⁴⁶ Art. 41(2)(c) of Directive 2013/32/EU.

⁴⁷ See Art 47(6) and (7) of Directive 2013/32/EU.

this case that asylum seekers for whom another Member State is responsible on the basis of the Dublin Regulation fall under the personal scope of the Reception Conditions Directive until they have actually been transferred to the responsible Member State. The CJEU based this conclusion on the fact that for such asylum seekers, a 'final decision' on their application has not yet been taken. The CJEU, however, failed to address the question whether these asylum seekers are still allowed to remain on the territory of the Member State in which they have lodged their asylum application. Since the CJEU referred to the general scheme and purpose of the Directive and to the observance of human rights as arguments for this interpretation, this could indicate that the CJEU is, more generally, of the opinion that asylum seekers fall under the personal scope of the Directive until they have received a final decision on their application.

4. SATURATION OF RECEPTION NETWORKS

When the number of arriving asylum seekers significantly increases in a Member State, there is a risk that the general reception facilities that the Member State has in place for asylum seekers become overcrowded or even completely full. The Directive allows Member States to react to such a saturation of the reception network in (only) two ways.

The first option is laid down in Article 18(g). This Article mentions explicitly the situation that 'housing capacities normally available are temporarily exhausted'. In that case, Member States may, exceptionally, 'set modalities for material reception conditions different from those provided for in this Article'. The possibility of departing from the obligations laid down in Article 18 is further conditioned by the requirement to have a 'duly justified case' to deviate and to apply these exceptions for as short as possible. Article 18 provides further rules when accommodation is provided in kind. It stipulates, for example, in paragraph 1 that where housing is provided in kind, it should take one or a combination of the following forms:

- a. 'Premises used for the purpose of housing applicants during the examination of an application for international protection made at the border or in transit zones;
- b. Accommodation centres which guarantee an adequate standard of living;
- c. Private housing, flats, hotels or other premises adapted for housing applicants.'

Accordingly, asylum seekers can be housed in all kinds of premises, as long as these premises are specifically adapted for or used for the housing of asylum seekers. With reference to Article 18(g), however, Member States can house asylum seekers in premises that are not specifically meant for or adapted for housing asylum seekers. The current situation shows that many Member States do indeed use this possibility and accommodate asylum seekers in various forms

of emergency shelters, such as (army) tents, municipal evacuation shelters, or sports halls.⁴⁸

Article 18(g) gives the possibility to temporarily depart from all rules laid down in Article 18. As a result, if normally available housing capacities are temporarily exhausted, Member States can also deviate from the requirement to take into consideration gender and age-specific concerns of asylum seekers when housing them;⁴⁹ to ensure that transfers of asylum seekers to another reception facility only take place when necessary;⁵⁰ and to ensure that reception centre personnel are adequately trained.⁵¹

The second option that Member States have is to provide for accommodation in the form of financial allowances. This option is not limited to the situation of saturation of reception networks. Member States can under all circumstances choose between providing accommodation in kind, as financial allowances or in vouchers, as long as they ensure that the material reception conditions 'provide an adequate standard of living for applicants, which guarantees their subsistence and protects their physical and mental health'.⁵²

In *Saciri*,⁵³ the CJEU ruled that if Member States choose to provide for accommodation in the form of financial allowances, the amount of these allowances must be such that asylum seekers are actually and effectively able to obtain housing, if necessary on the private rental market. In addition, housing should immediately be available when asylum seekers make their application for asylum. In this case, the reception facilities for asylum seekers in Belgium were overloaded, as a result of which asylum seekers were referred to bodies in the general public assistance system. The *Saciri* family was referred to such a body, but was unable to find housing or to pay the rent at the private rental market. The CJEU held that Member States have a certain margin of discretion as regards the methods by which they provide the material reception conditions and that they may use, therefore, bodies of the general public assistance system as intermediary. However, Member States should ensure that those bodies provide the minimum standards laid down in the Directive; 'saturation of the reception networks not being a justification for any derogation from meeting those standards'.⁵⁴

⁴⁸ See for example Sweden (<http://www.migrationsverket.se/English/Private-individuals/Protection-and-asylum-in-Sweden/Nyheter/2016-02-05-Great-need-for-housing-despite-fewer-applicants.html>); the Netherlands (<https://www.government.nl/topics/asylum-policy/contents/asylum-procedure/reception-asylumseeker>); Germany (<http://www.asylumineurope.org/reports/country/germany/reception-conditions/access-forms-reception-conditions/types-accommodation>); France (<http://www.asylumineurope.org/reports/country/France/reception-conditions/access-and-forms-reception-conditions/types>).

⁴⁹ Art. 18(3) of Directive 2013/33/EU.

⁵⁰ Art. 18(6) of Directive 2013/33/EU.

⁵¹ Art. 18(7) of Directive 2013/33/EU.

⁵² Art. 17(2) Directive 2013/33/EU.

⁵³ CJEU 27 February 2014, C-79/13 (*Saciri*).

⁵⁴ Para. 50.

The *Saciri* judgment was positively received by some commentators as an extension of asylum seekers' rights under the Directive. The judgment would display a 'robust upholding of asylum seekers' rights'⁵⁵ or an 'extension of the protection scope of the Directive'.⁵⁶ In my view, however, the Court answers to the preliminary questions follow logically from the wording of the definition of 'material reception benefits' in the Directive, which explicitly includes housing, and the lack of a possibility to reduce or withdraw reception benefits in case of saturation of the reception facilities.⁵⁷

To conclude, if the reception capacity in Member States becomes overloaded due to an increase in asylum applications, Member States can either temporarily provide for forms of emergency shelter that do not need to comply with all the rules laid down in the Directive for the provision of housing in kind, or they can provide asylum seekers with enough financial benefits in order for them to effectively and immediately find their own housing. Not providing any kind of housing to asylum seekers, even temporarily, is not in conformity with the Directive. When adopting the Directive, the Member States have, therefore, subjected themselves to an important, result-oriented obligation; an obligation that is more far reaching than the more perform-oriented obligation to provide for housing in human rights treaties, which generally leaves room for budgetary constraints and for progressive realization.⁵⁸

5. RELEVANCE OF THE LAPSE OF TIME

The length of the asylum procedure can vary widely, both within a Member State, as well as among Member States. When large numbers of asylum seekers apply for asylum simultaneously, the length of the procedure can increase significantly. The Asylum Procedures Directive holds that, generally, Member States should conclude the procedure in first instance within six months from the lodging of an application.⁵⁹ However, while Member States may provide for acceler-

⁵⁵ B. Venkata, 'Destitute asylum seekers - what are member states' obligations? Case Comment: *federaal agentschap v Saciri*, available at: <http://eutopialaw.com/2014/03/04/destitute-asylum-seekers-what-are-member-states-obligations-case-comment-federaal-agentschap-v-saciri-c-7913/>.

⁵⁶ M. Enquist Källgren, 'A worthy standard of living for asylum seekers and Belgian catch-22', available at: <http://luxembourgweekly.blogspot.nl/2014/03/c-7913-saciri-migration-law.html>.

⁵⁷ See my case comment in EHRC 2014/95. See also S. Peers, 'The CJEU secures asylum seekers' right to family housing', available at: <http://eulawanalysis.blogspot.nl/2014/02/what-obligations-do-member-states-have.html>. As discussed in these case comments, the CJEU does broaden Member States' obligations a bit with regard to the obligation to protect family unity.

⁵⁸ Cf. Art. 2 of the International Covenant on Economic, Social and Cultural Rights; Art. 31(2) of the European Social Charter (Revised).

⁵⁹ Art. 31(3) of Directive 2013/32/EU.

ated procedures on a number of grounds,⁶⁰ they may also extend the time limit with another nine months where complex legal and factual issues are involved in the individual case; the delay is attributable to the asylum seeker; or, a large number of asylum seekers simultaneously apply for asylum.⁶¹ In addition, by way of exception, Member States may exceed the time limits by a maximum of three months 'where necessary in order to ensure an adequate and complete examination of the application for international protection'.⁶² Hence, Member States may, under certain, rather widely defined, circumstances take 18 months to decide on the asylum application. Alongside possibilities for extending and exceeding time limits, Member States may postpone the procedure in first instance 'due to an uncertain situation in the country of origin which is expected to be temporary'.⁶³ In any event, the procedure in first instance should be concluded within 21 months from the lodging of the application.⁶⁴ These time limits only apply to the procedure in first instance. If the asylum application is rejected, the procedure in first instance is usually followed by an appeal procedure, sometimes in two instances. The Asylum Procedures Directive does not contain time limits for the conclusion of this part of the procedure; it only allows Member States to lay down time limits in their domestic legislation.⁶⁵ Accordingly, an asylum procedure that takes many months or years is not in violation of, nor unforeseen by EU law.

The Reception Conditions Directive does take a possible long duration of asylum procedures into account by providing for an (albeit rather limited) accretion in rights through the passage of time. For example, Article 15(1) of the directive holds that Member States should ensure that asylum seekers have access to the labour market no later than nine months from the lodging of the application. This obligation, however, only applies if a first instance decision by the competent authority has not been taken within these nine months *and* the delay cannot be attributed to the applicant. If the authorities reject the application within nine months (or if a delay on the decision can be attributed to the asylum seeker) Member States may deny asylum seekers access to the labour market pending possible appeal procedures. The Directive, therefore, under certain conditions still allows Member States to deny access to the labour market pending the entire asylum procedure, which may take years. If, however, the authorities are unable to decide on the application within nine months – which may happen more often now with the increase in asylum applications and which is allowed for under the Asylum Procedures Directive – Member States should ensure access to the labour market. Member States may set conditions for granting access and may give priority to Union citizens and to legally resident

⁶⁰ Art. 31(8) of Directive 2013/32/EU.

⁶¹ Art. 31(3) of Directive 2013/32/EU.

⁶² *Idem*.

⁶³ Art. 31(4) of Directive 2013/32/EU.

⁶⁴ Art. 31(5) of Directive 2013/32/EU. Note that these time limits should only be transposed into domestic law by 20 July 2018 (art. 51(2) Directive 2013/32/EU).

⁶⁵ Art. 46(10) of Directive 2013/32/EU.

third-country nationals, but should ensure 'effective' access.⁶⁶ In addition, once access to the labour market is provided, it may not be withdrawn during appeals procedures, if the appeal has suspensive effect.⁶⁷

Another example of a provision where the passage of time plays a role is Article 14 on education. Article 14(2) provides that access to the education system for minors may be postponed, but for no longer than three months from the lodging of the application. In addition, Article 14(1) stipulates that once access to secondary education is provided, it may not be withdrawn for the sole reason that the minor has reached the age of majority.

Other provisions do not refer to the passage of time, where this would have made sense in view of relevant state practice. For example, providing material reception benefits entirely in kind (apart from a daily expenses allowance); housing asylum seekers in accommodation centres; deciding on the residence of asylum seekers; and making provision of the material benefits subject to actual residence in a specific place; all of these lack a specific time limit. Asylum seekers may be accommodated in (large scale) accommodation centres and may be subjected to an obligation to live there throughout the asylum procedure. Time limits on the provision of in kind benefits and/or accommodation in large scale accommodation centres do exist in state practice. For example, in Belgium, asylum seekers can apply for a transfer to individual accommodation after they have lived for four months in a collective accommodation centre, provided their application has not been rejected.⁶⁸ In Germany, regular social assistance benefits are provided to asylum seekers after 15 months of receiving more limited and usually in kind benefits under the Asylum Seekers' Benefits Act.⁶⁹

6. CONCLUSION

The Directive refers only once to the situation that Member States receive many asylum applications; if the normally available housing capacities for asylum seekers are temporarily exhausted, Member States may, in duly justified cases and for as short as possible, deviate from the specific safeguards laid down in the Directive for housing that is provided in kind. The Asylum Procedures Directive provides for an extension of the deadline for registration and for an extension of

⁶⁶ Art. 15(2) of Directive 2013/33/EU.

⁶⁷ Art. 15(3) of Directive 2013/33/EU.

⁶⁸ Art. 12(1) *Wet betreffende de opvang van asielzoekers en van bepaalde andere categorieën van vreemdelingen*. After a negative decision, asylum seekers can still apply for a transfer if they have lodged an appeal with the Council of State that has been declared admissible. See also: http://www.asylumineurope.org/sites/default/files/report-download/aida_be_update.iv__o.pdf.

Due to the increase in asylum applications, these transfers have been put on hold. Since August 2015, asylum applicants with a high chance of receiving international protection (e.g. Syrians) are immediately assigned to an individual accommodation structure.

⁶⁹ § 2(1) *Asylbewerberleistungsgesetz (AsylbLG)*. See also: http://www.asylumineurope.org/sites/default/files/report-download/aida_de_update.iv__o.pdf, p. 50.

the deadline to conclude the procedure in first instance when a large number of asylum seekers apply simultaneously for asylum, which (arguably) affects the start and duration of Member States' obligations under the Directive. Apart from this, the Directive leaves no room for exceptions based on high numbers of asylum applications, as has been explicitly confirmed by the CJEU. The Directive does provide for a number of important rights for asylum seekers. For example, they have a right to be provided with housing or enough money to be able to effectively obtain housing themselves and, if they have not received a first instance decision within nine months, to have effective access to the labour market. It is, therefore, important to establish the precise personal scope of the Directive.

In its evaluation report regarding the 2003 Directive, the Commission concluded that the objective of creating a level playing field in the area of reception conditions had not been reached.⁷⁰ Even though the 2013 recast of the Directive changed little regarding Member States' obligations, it would now be possible to conclude differently, due to changed circumstances and Member States' reactions to the increase in asylum applications. Although there remains room for improvement with regard to the content of the recast Directive,⁷¹ in the light of the current developments, the focus should first be on the correct implementation of this Directive. Other contributions in this book will critically examine this.

⁷⁰ European Commission, *Report from the Commission to the Council and to the European Parliament on the application of Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers*, COM(2007) 745 final.

⁷¹ For example from the perspective of state practice as mentioned above in para. 5 or from the perspective of Member States' obligations under international refugee law, social security law and human rights law. See: L. Slingenberg, *The Reception of Asylum Seekers under International Law. Between Sovereignty and Equality*, Oxford: Hart Publishing 2014.

2. The Impact of the Negotiations on the Recast Reception Conditions Directive

Evangelia (Lilian) Tsourdi

1. INTRODUCTION

Reception conditions have been an integral part of the European asylum policy since its inception. The original legal basis included 'minimum standards on the reception of asylum seekers in the Member States' as one of the measures to be adopted.¹ This concerned formally only applicants for refugee status, although most EU Member States established a single procedure and therefore applied these minimum standards to all applicants. As a result, the Reception Conditions Directive was adopted in 2003² after 2.5 years of negotiations.³ Some of the thorniest issues during the negotiations of that instrument were: access to employment and to vocational training, the scope of application of the instrument and exceptions to the principle of freedom of movement.⁴ The 2003 Directive established minimum standards covering different aspects of the rights and treatment of asylum such as material reception conditions, healthcare and access to employment.

In its report on the application of the 2003 Directive, the Commission noted that Member States had not lowered their previous standards of assistance to asylum seekers as a result of the adoption of the Directive.⁵ However, it also stressed that the wide discretion allowed by the 2003 Directive in a number of areas undermined the objective of creating a level playing field in the area of reception conditions.⁶ These conclusions were also supported by the findings of the 2006 study of the Odysseus network on the transposition of the Directive which revealed that there were significant divergences in state practice, in par-

¹ See Consolidated Version of the Treaty Establishing the European Community, 2006, OJ C 321 E/37 [TEC], Article 63(1).

² Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, OJ L31/18 [2003 Reception Conditions Directive or 2003 Directive or RCD].

³ The European Commission had presented its proposal in 2001. See European Commission, *Proposal for a Council Directive laying down minimum standards on the reception of applicants for asylum in Member States*, May 2001.

⁴ J. Handoll, 'Reception Conditions of Asylum Seekers', in: P. De Bruycker & C. De Sousa Urbano Dias (eds), *The Emergence of a European Asylum Policy*, Brussels: Bruylant 2004, p. 113, 123-125.

⁵ European Commission, *Report on the application of directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers*, COM(2007) 745 final, at p. 10 [Commission 2007 RCD Report].

⁶ *Ibid.*, p. 10-11.

ticular in the following areas: the scope of application of the instrument *ratione personae*, the regulation of the issue of detention of asylum seekers as well as the implementation of provisions in favour of vulnerable asylum seekers.⁷

However, apart from the issue of detention, the greatest problems that were observed on the ground, were not so much due to the quality of the legal instrument, but rather to poor investment in national reception systems and non-implementation of standards. The data reported in a 2014 European Migration Network study, attest to the divergences of amounts dedicated to asylum seekers per Member State, as well as to the different level of investment and ensuing quality of their reception systems.⁸ In addition, reports by, among others, civil society organisations,⁹ the Commissioner for Human Rights of the Council of Europe,¹⁰ special procedures of the Human Rights Council of the UN,¹¹ as well as relevant ECtHR case-law,¹² attest to significant numbers of asylum seekers in some Member States facing, at times, a complete lack of reception conditions, both in-kind and financial.

Bearing this context in mind, this contribution focuses on the issue of the impact of the negotiations on the recast instrument. It maps out the cumbersome adoption process, outlining the institutional dynamics. It then demonstrates the impact of the negotiations focusing on key areas of the instrument. A final section critically reflects on the level of harmonization achieved in the recast instrument, its adherence with fundamental rights, as well as the nature of the main challenges in this area.

⁷ Odysseus Academic Network, *Comparative overview of the implementation of the Directive 2003/9 of 27 January 2003 laying down minimum standards for the reception of asylum seekers in the EU Member States*, 2006 [Odysseus 2006 RCD Study], p. 75-77.

⁸ European Migration Network, *Synthesis Report: The Organisation of Reception Facilities for Asylum Seekers in different Member States*, EMN 2014.

⁹ See for example the Asylum Information Database (AIDA), an ECRE project, containing country reports, also covering reception conditions, in 14 countries. Accessible at: <http://www.asylumineurope.org/reports>.

¹⁰ See for example Council of Europe: Commissioner for Human Rights, *Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Malta from 23 to 25 March 2011*, CommDH(2011)17 (CoE 2011) and Council of Europe: Commissioner for Human Rights, *Report by Nils Muižnieks Commissioner for Human Rights of the Council of Europe following his visit to Greece from 28 January to 1 February 2013*, 16 April 2013, CommDH(2013)6 (CoE 2013).

¹¹ See for example UN Human Rights Council, *Report of the Special Rapporteur on the human rights of migrants, Regional study: management of the external borders of the European Union and its impact on the human rights of migrants*, 24 April 2013, A/HRC/23/46 (UN 2013) and UN Human Rights Council, *Report by the Special Rapporteur on the human rights of migrants, Addendum: Mission to Italy*, 30 April 2013, A/HRC/23/46/Add.3 (UN 2013).

¹² See for example, *MSS v Belgium and Greece*, App. n° 30696/09 (ECtHR, 21 January 2011) as well as *Tarakhel v. Switzerland*, App. n° 29217/12 (ECtHR, 4 November 2014).

2. THE CUMBERSOME ADOPTION OF THE RECAST

As part of the CEAS reform, the Commission published its first recast proposal in 2008 with two main aims. Firstly, to ensure higher standards of treatment for asylum seekers with regard to reception conditions that would guarantee a dignified standard of living, in line with international law, and secondly, to limit the phenomenon of secondary movements of asylum seekers amongst Member States, to the degree that such movements are generated from divergences between national reception policies.¹³ This legislative instrument was to be adopted under the legislative process of co-decision,¹⁴ since the TEC stipulated that this was the procedure to be followed for the adoption of all recast asylum instruments.¹⁵

Negotiations between the European Parliament and the Council commenced on the basis of the 2008 Commission proposal, and, in May 2009, Parliament adopted its first reading position.¹⁶ The reason why the EP hastened to adopt its own first reading position without pre-negotiating with the Council was that the Rapporteurs and their negotiating teams were keen to finalise the first reading agreement of their institution before the end of their term, as this allowed them to leave their print on the follow-up during the next legislative term.¹⁷ This was exceptional; until that point the LIBE Committee had always adopted the strategy to avoid sending out its first reading position and then to be politically locked in the phase of the legislative process in which no time constraints exist for the Council to adopt its first reading position.¹⁸

While the first reading was concluded by the Parliament, negotiations within the Council soon revealed that there was intense discord on several issues and

¹³ European Commission, *Proposal for a directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers*, COM (2008) 815 final, 2008, Explanatory Memorandum, 4 [2008 Commission Proposal].

¹⁴ Article 294 of the Treaty on the Functioning of the EU contains the consecutive steps of the co-decision procedure, now also termed as 'the ordinary legislative procedure'. These rules were formerly contained in Article 251 TEC.

¹⁵ The Treaty of Nice which entered into force on 1st February 2003, had amended Article 67 of TEC adding a fifth paragraph which stated the following: '[b]y derogation from paragraph 1, the Council shall adopt, in accordance with the procedure referred to in Article 251 [the co-decision procedure]: the measures provided for in Article 63(1) and (2)(a) [measures of the asylum policy] provided that the Council has previously adopted, in accordance with paragraph 1 of this Article, Community legislation defining the common rules and basic principles governing these issues'.

¹⁶ European Parliament, *European Parliament legislative resolution on the proposal for a directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (recast)*, (COM(2008)0815 – C6-0477/2008 – 2008/0244(COD)), May 2009 [2009 EP position].

¹⁷ P. van de Peer, 'Negotiating the Second Generation of the Common European Asylum System Instruments: A Chronicle', in: V. Chetail, P. De Bruycker & F. Maiani (eds), *Reforming the Common European Asylum System: The New European Refugee Law*, p. 55, 56.

¹⁸ *Ibid.*, p. 57. See also TFEU, Article 294(4)-(5).

that it would not be possible to find agreement on the basis of the text proposed. Some of the main 'sticking points' were: access to the labour market,¹⁹ the obligation to establish procedures to identify persons with special reception needs,²⁰ and the level of material reception conditions to be made available.²¹ The Council never adopted its first reading position on this text. The European Parliament was keen to continue the negotiations but was stuck due to the (non)-dynamics of Article 294 TFEU, that made the Parliament fully depending on the willingness of the Council to further proceed with its position and to start up negotiations.²²

In the meantime, the legal basis of the CEAS was reformed with the formal entry into force of the Lisbon Treaty. Article 78 of the Treaty on the Functioning of the European Union (TFEU) calls for the development of '[a] *common* policy on asylum, subsidiary protection and temporary protection'²³ as well as for the adoption of measures comprising of '[s]tandards concerning the conditions for the reception of applicants for asylum or subsidiary protection'.²⁴

The overall level of ambition is indeed higher as the Treaty speaks of the development of a 'common' policy. I note, however, that despite the fact that the Treaty no longer stipulates the adoption of 'minimum' standards on reception conditions, it does not call either for the adoption of 'common' standards in this area.²⁵ Instead, the Union is expected to adopt 'standards' on reception conditions. This could be understood as recognition by the drafters that although the standards established should no longer be 'minimum', at the same time, harmonisation in this area of the asylum policy is to result in comparable rather than common standards.²⁶

In order to overcome the political impasse, the Commission launched an amended recast proposal on June 2011.²⁷ Therein, the Commission explained

¹⁹ See 2008 RCD Commission Proposal, Article 15 para. 1 which stated that: '[m]ember States shall ensure that applicants have access to the labour market no later than 6 months following the date when the application for international protection was lodged'.

²⁰ See 2008 Commission Proposal, Article 21 para. 2.

²¹ See 2008 Commission Proposal, Article 17 para. 5 which stated that: '[in] calculating the amount of assistance to be granted to asylum seekers Member States shall ensure that the total value of material reception conditions to be made available to asylum seekers is equivalent to the amount of social assistance granted to nationals requiring such assistance. Any differences in this respect shall be duly justified'.

²² P. van de Peer, 'Negotiating the Second Generation', *op.cit.*, p. 59.

²³ Treaty on the Functioning of the European Union (TFEU) O.J. 2010, C 83/47, Article 78 para. 1 [emphasis added].

²⁴ TFEU, Article 78, para. 2(f).

²⁵ See in comparison TFEU, Article 78 para. 2(c) which stipulates the adoption of '*common* procedures for the granting and withdrawing of uniform asylum or subsidiary protection status' [emphasis added].

²⁶ E. Tsourdi, 'Reception Conditions for Asylum Seekers in the EU: Towards the Prevalence of Human Dignity', 29(1) *JIANL* 2015, p. 9, 13.

²⁷ European Commission, Amended proposal for a directive of the European Parliament and of the Council laying down standards for the reception of asylum seekers (Recast), COM(2011) 320 final, 2011, [2011 Commission Amended Proposal].

that the text introduces clearer concepts and more simplified rules and grants Member States more flexibility in integrating them into their national legal systems.²⁸ However, it stressed that the amended proposal was based on the same fundamental principles.²⁹ This approach is exemplified by the provisions governing the detention regime for asylum seekers. Although the amended recast proposal continues to regulate in a detailed manner detention conditions, it introduced the possibility for Member States to derogate from some of the rules 'in duly justified cases and for a reasonable period which shall be as short as possible'.³⁰

With the introduction of this new text, negotiations between the two co-legislators resumed. The re-opening of negotiations was greatly boosted by the interactions within the informal inter-institutional 'contact group' composed of: a representation of the trio presidencies, the LIBE chair and all rapporteurs and shadow rapporteurs of the CEAS package instruments and the Commissioner, or senior representatives of DG Home.³¹ In the course of 2012, a series of informal 'trialogues' took place. Trialogues are tripartite meetings between the European Parliament, the Council and the Commission during which a common position is sought between the amendments of the Parliament and the position of the Council on the Commission proposal. They are attended by the Presidency on behalf of the Council, the Rapporteur and Shadow rapporteurs of the file on behalf of the EP, and senior officials from DG HOME on behalf of the Commission. Although formally such a process is foreseen only at second reading, as institutional practice on co-decision developed, they have become a common tool of pre-negotiation even before reaching that stage of the legislative process.³²

At this stage of the process in 2012, the purpose of those meetings was the following: while the EP retained its first reading position adopted in 2009 on the basis of the former version of the Directive as it considered that those positions continued to be valid,³³ the Council sought to adopt its own position at first reading. In short, what the co-legislators tried to achieve was the road not taken in 2009 due to the end of the previous EP legislature, that is to come to a commonly agreed text, prior to an official adoption by the Council of its first reading position.

²⁸ *Ibid.*, Explanatory Memorandum, p. 3.

²⁹ *Ibid.*

³⁰ See 2011 Amended Commission Proposal, Article 10 para. 6.

³¹ P. van de Peer, 'Negotiating the Second Generation', *op.cit.*, p. 62.

³² See also information about the ongoing public consultation on the transparency of trialogues conducted by the European Ombudsman at: <http://www.ombudsman.europa.eu/cases/correspondence.faces/en/61589/html.bookmark>.

³³ This was a strategic choice of the LIBE-Committee as the full procedure from draft report, through amendments to final position from the Parliament side would have been extremely time-consuming; see P. van de Peer, 'Negotiating the Second Generation', *op.cit.*, p. 62.

Negotiations resulted in a political compromise in September 2012.³⁴ In the process of those negotiations the 2011 text was further amended. Despite agreement having been reached, for technical reasons, involving the timing of the finalisation of the pending negotiations of other asylum instruments, the text was officially adopted and published in June 2013.³⁵ Member States bound by the recast Directive should have transposed it by July 2015.³⁶ The next section maps out the impact of these cumbersome negotiation proceedings on the final instrument by focusing on selected provisions.

3. IMPACT OF THE NEGOTIATIONS ON THE RECAST DIRECTIVE: SELECTED ISSUES

The provisions have been selected on the following basis: they concern issues where significant amendments were brought about by the recast, or that proved controversial during the negotiations, or both. This selection is indicative of trends that are supported by the study of the entire instrument undertaken elsewhere.³⁷

3.1 Detention Grounds, Detention Conditions and Vulnerability and Detention

Apart from the ambiguous provision in Article 7(3), the former Asylum Reception Directive 2003/9/EC failed to regulate detention of asylum seekers or enumerate permissible detention grounds. This reflects the political unease that the subject generated at the time.³⁸ Addressing this gap was one of the main stated aims of the recasting process. In its 2008 proposal, the Commission stressed that it was

³⁴ See, Council of the European Union, Amended proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of asylum seekers (Recast) (First reading), Political agreement, Doc. 14112/1/12, REV 1, September 2012.

³⁵ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), OJ L180/96, [Recast Reception Conditions Directive or recast RCD].

³⁶ See recast RCD, Article 31.

³⁷ For a detailed analysis of all the provisions of the recast RCD see M. Peek & E. Tsourdi, 'Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection', in: K. Hailbronner & D. Thym, *EU Immigration and Asylum Law Commentary*, Beck/Hart Publishing 2016. See also the following works: V. Moreno-Lax & E. Guild, 'Reception Conditions', in: S. Peers, V. Moreno-Lax, M. Garlick & E. Guild (eds), *EU Immigration and Asylum Law (Text and Commentary): Second revised edition*, Brill/Martinus Nijhoff 2014, p. 497-544, as well as L. Slingenbergh, *The Reception of Asylum Seekers under International Law*, Hart Publishing 2014, p. 65-82.

³⁸ D. Wilsher, 'Immigration Detention and the Common European Asylum Policy', in: A. Baldacinni, E. Guild & H. Toner, *Whose Freedom, Security and Justice?: EU Immigration and Asylum Law and Policy*, Hart Publishing 2007, p. 421.

'necessary to address this issue in a holistic way in this directive with a view to ensure that detention is not arbitrary and that fundamental rights are respected in all cases'.³⁹ The provisions contained in that proposal, however, did not form the basis of a satisfactory starting point for the Member States. This led the Commission, in its 2011 Amended Proposal to introduce 'more flexibility for some of the proposed detention rules' and to clarify different notions 'in order to facilitate their implementation, and to accommodate certain particularities of Member States' different legal systems'.⁴⁰ In the course of the last round of negotiations, the provision was further modified. This section focuses in particular on the following elements: detention grounds, elements of detention conditions and detention of vulnerable groups.

First, regarding detention grounds, the 2008 Commission proposal contained an exhaustive list of four grounds: (a) in order to determine, ascertain or verify identity or nationality; (b) in order to determine the elements on which an application for asylum is based which in other circumstances could be lost; (c) in the context of a procedure, to decide on his right to enter the territory; (d) when protection of national security and public order so requires.⁴¹ The 2011 amended Commission proposal strengthened guarantees as it framed the second ground more restrictively to read: 'in order to determine, *within the context of a preliminary interview*, the elements on which the application for international protection is based which could not be obtained in the absence of detention'.⁴² It also stated that any such detention was without prejudice to 'detention in the framework of criminal proceedings'.⁴³

During the 2012 negotiations, Council delegations raised the number of permissible detention grounds from 4 to 6.⁴⁴ The two additional grounds were retained in the final instrument and concern: a significant risk of absconding in the course of transfer proceedings under the recast Dublin Regulation,⁴⁵ and the filing of an asylum application during return proceedings.⁴⁶ In addition to the introduction of additional grounds, clarity was lost on the short time-frame that the second ground contained as it was no longer explicitly restricted to 'the context of a preliminary interview'.⁴⁷ This was only partly counterbalanced by the introduction of a recital that called for the introduction of 'due diligence' consid-

³⁹ 2008 Commission Proposal, Explanatory Memorandum, 6.

⁴⁰ 2011 Commission Amended Proposal, Explanatory Memorandum, 6.

⁴¹ 2008 Commission Proposal, Article 8(2)(a)-(d).

⁴² 2011 Amended Commission proposal, Article 8(3)(b), emphasis added.

⁴³ 2011 Amended Commission proposal, Article 8(3), first indent.

⁴⁴ See e.g. Council doc. 6799/12 of 29 February 2012, 28-29.

⁴⁵ See recast RCD, Article 8(3)(f) and Regulation (EU) No 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [Recast Dublin Regulation], Article 28.

⁴⁶ Recast RCD, Article 8(3)(d).

⁴⁷ Recast RCD, Article 8(3)(b). For a detailed analysis of the detention grounds in the recast RCD see E. Tsourdi, 'Asylum Detention in EU Law: Falling between Two Stools?', (2016) 35 *RSQ*, p. 7.

erations in ascertaining whether any of the detention grounds was applicable in given case.⁴⁸

Significant changes were also brought about concerning the placement in detention of vulnerable applicants. Article 11(5) of the 2008 Commission Proposal established that applicants with special needs should not be detained 'unless an individual examination of their situation by a qualified professional certifies that their health, including their mental health, and well-being, will not significantly deteriorate as a result of the detention'. This would have rendered their detention exceptional. The 2011 Commission Amended Proposal adopted a similar approach,⁴⁹ although the reference to a 'qualified professional' providing a certification was dropped. This would have allowed some discretion to Member States when deciding which authority would be responsible to decide on whether detention is a suitable measure for vulnerable applicants.

Despite this relative easing, this proposal was still not an acceptable basis for compromise for the Member States.⁵⁰ The final text contains a significantly lowered standard. Namely, there is no mention at all of the fact that vulnerable applicants should as a principle not be detained. Instead the relevant article states that: 'the health, including mental health, of applicants in detention who are vulnerable persons shall be of primary concern to national authorities'.⁵¹ A further example contains the detention of an extremely vulnerable group, that of unaccompanied minors. The 2008 proposal categorically exempted this group from detention.⁵² The 2011 text moderated this by permitting recourse to detention: 'only in particularly exceptional cases'.⁵³ The final agreed text endorses recourse to detention: 'only in exceptional circumstances'.⁵⁴

Another area where the impact of the negotiations was particularly felt was detention conditions. Article 10(1) of the 2008 Commission Proposal excluded the possibility of asylum seekers' detention in prison accommodation and foresaw that they should always be separated from other detained third country nationals, unless it was for the benefit of ensuring family unity. The 2011 Commission Amended Proposal established some flexibility by permitting the use of prison accommodation in 'duly justified cases and for a reasonable period'.⁵⁵ That version also introduced exceptions under the same conditions regarding the obligation to inform detained asylum seekers of their rights and obligations when they are held in a border post or in a transit zone.⁵⁶

⁴⁸ Recast RCD, Recital 16.

⁴⁹ 2011 Amended Commission proposal, Article 11(1).

⁵⁰ See e.g. Council doc. 13102/11 of 12 September 2011 and Council doc. 6799/12 of 29 February 2012.

⁵¹ Recast RCD, Article 11(1).

⁵² Article 11(1) second indent of the 2008 Commission Proposal unequivocally stated that: unaccompanied minors 'shall never be detained'.

⁵³ 2011 Amended Commission proposal, Article 11(2), third indent.

⁵⁴ Recast RCD, Article 11(3).

⁵⁵ 2011 Amended Commission proposal, Article 10(1) and (6).

⁵⁶ See 2008 Commission Proposal, Article 10(3) with 2011 Commission Amended Proposal, Article 10(5) and (6).

The agreed text contains further modifications that dilute these guarantees. Instead of an exceptional arrangement that needs justification, the final text mentions that special facilities should be used as a principle and that Member States can have recourse to prison accommodation whenever they are obliged to.⁵⁷ It is only through the jurisprudence of the CJEU that a restrictive application of the use of this provision can be achieved.⁵⁸ On the other hand, the obligation to provide access to open air spaces was only added in the 2011 Commission Amended Proposal and was later retained in the final text of the directive.

3.2 Access to the Labour Market

Access to the labour market was a particularly controversial issue in the drafting process of the former, as well as the recast Asylum Reception Directives. Such was the discord in the negotiations of the former Asylum Reception Directive 2003/9/EC, that the Working Party finally submitted it to the Strategic Committee in order to find a political compromise.⁵⁹ The final compromise that was reached was close to one of the scenarios that had been considered, namely to grant access after a waiting period under certain conditions.⁶⁰ However, it also left the length of the waiting period almost completely open and did not define or at least suggest the conditions under which access to the labour market should be granted.⁶¹

Article 15(1) of the 2008 Commission Proposal revisited the initial approach and aimed at achieving a higher degree of harmonisation. It reduced the waiting period to a maximum of six months regardless of whether a decision at first instance has been taken or not. It stated that Member States must not 'unduly' restrict access, keeping, however, the power for Member States to define conditions under which access would have been eventually granted.⁶² Finally, the possibility to give priority to EU citizens and legally resident third country nationals for reasons of labour market policies was deleted.

The 2011 Commission Amended Proposal already introduced more flexibility into Article 15. It kept, in principle, a reduction of the waiting period in 6 months, but also foresaw some cases where this could be extended for an additional 6 months. It permitted conditions but also required that 'asylum seekers have effective access to the labour market'. It retained deletion of priority rules. For its part, the European Parliament supported the Commission's original approach

⁵⁷ Recast RCD, Article 10(1).

⁵⁸ Reference is made to an application by analogy of the case-law of the Court in the domain of return and namely to CJEU, Joined Cases C-473/13 and C-514/13, *Bero and Bouzalmate v. Kreisverwaltung Kleve* [2014] EU:C:2014:2095.

⁵⁹ Council doc. 5430/02 of 21 January 2002, 2.

⁶⁰ Council doc. 5430/02 of 21 January 2002, 4 and Council doc. 5791/02 of 6 February 2002, 2. See also S. Vincenzi, 'Reception Conditions of Asylum Seekers: Comments', in: C. Dias Urbano de Sousa & P. De Bruycker (eds), *The Emergence of a European Asylum Policy*, Bruylant 2004, p. 157, 163 seq.

⁶¹ See former Asylum Reception Directive 2003/9/EC, Article 11.

⁶² See 2008 Commission Proposal, Article 15(2) and SEC (2008) 2944, 37.

contained in its 2008 proposal.⁶³ However, some of the negotiators at the Council feared that such amendments were far-reaching and could create a pull factor for economic migrants and preferred to keep more flexibility.⁶⁴

The final compromise incorporates moderate changes compared to the former 2003 Asylum Reception Directive that are significantly watered down compared to the 2008 Commission proposal. For example, the final compromise between the European Parliament and the Council mathematically halves the difference between the two positions; thus access is to be granted 'no later than 9 months' from the date of the application.⁶⁵ However, an additional requirement is that no decision must have been taken at first instance and the delay should not be attributed to the applicant. Moreover, the priority rule is retained.⁶⁶ This illustrates that this part of the Directive continues to be politically sensitive.

3.3 Level of Material Reception Conditions Available

This provision constituted, unsurprisingly, one of the most contentious points of the negotiations of the recast Directive. It is worthy reminding that according to the 2003 version of the Directive material reception conditions may either be provided in kind or in the form of financial allowances or vouchers, or in a combination of the two. The 2006 Odysseus RCD Study found that where material reception conditions were provided exclusively or mostly in kind they were 'generally deemed adequate'.⁶⁷ On the contrary, where they were provided in terms of financial allowances they were found to be '[i]nadequate to ensure the health and/or subsistence of asylum-seekers'.⁶⁸

Cognizant of these realities on the ground, Article 17(5) of the 2008 Commission Proposal strived for a higher standard of reception conditions. It foresaw an equation of the total value of material reception conditions to be made available to asylum seekers with 'the amount of social assistance granted to nationals requiring such assistance'. Member States could deviate from this standard only in 'duly justified' cases. Nevertheless, neither the European Parliament, nor the Council supported this proposal. The 2011 Commission Amended Proposal slightly altered the original approach.⁶⁹ It specified that this passage concerned material conditions when they were provided in the form of 'financial allowances and vouchers'. It went on to note that the amount should be calculated on the basis of point(s) of reference, bringing the minimum level of social welfare assis-

⁶³ See 2009 European Parliament Resolution, Article 15.

⁶⁴ See e.g. Council doc. 13102/11 of 12 September 2011 and Council doc. 6799/12 of 29 February 2012.

⁶⁵ Recast RCD, Article 15(1).

⁶⁶ Recast RCD, Article 15(2).

⁶⁷ Odysseus 2006 RCD Study, *op.cit.*, p. 27-29.

⁶⁸ *Ibid.*, at p. 29.

⁶⁹ 2011 Amended Commission proposal, Article 17(5).

tance as an example. It then allowed less favourable treatment, when this was 'duly justified'.

However, the majority of the European Parliament, as well as Member States in the Council, continued to resist concrete references to national systems of social assistance.⁷⁰ The reference to the level of social welfare assistance was therefore dropped. The final text contains slightly enhanced but rather vague standards. Namely, Member States are to ensure that: '[m]aterial reception conditions provide an adequate standard of living for applicants, which guarantees their subsistence and protects their physical and mental health'.⁷¹ Member States are also to ensure that this standard of living is met in the specific situation of vulnerable persons, as well as in relation to the situation of persons who are in detention.⁷² Even though Member States remain free to include asylum seekers in the general system of social assistance, the Directive clearly envisions a separate support scheme for them. The CJEU case-law will therefore be of extreme importance in this area in order to concretize these standards.⁷³

4. CONCLUSIONS

The analysed provisions attest to the far-reaching impact of the negotiations on the recast directive. The level of harmonization is certainly higher than that afforded by the previous legislative instrument. Several areas were specified and ambiguities were addressed. One such area is the detailed regulation of detention grounds and detention conditions for asylum seekers; as well as the establishment of procedural safeguards. Nevertheless, long-drawn negotiations, and the fact that the Commission had to issue an amended recast proposal in order to overcome the political impasse, led to the dilution of the level of legal clarity and undermined the harmonising potential of the recast instrument.

Firstly, a number of exceptional clauses were either retained or introduced in the legal instrument, such as for example the possibility for Member States to derogate from the established detention conditions. Secondly, the instruments contain legally vague notions that allow considerable discretion to Member States to define the scope of their obligations. An example is the method by which the level of material reception conditions, when they are provided in the form of vouchers or financial allowances, is to be defined.

Moreover, the debate on provisions that impact public finances such as the level of material reception conditions and its relation to national social assis-

⁷⁰ See e.g. Council doc. 6799/12 of 29 February 2012.

⁷¹ Recast RCD, Article 17, para. 2.

⁷² *Ibid.*

⁷³ Some first elements are included in a case concerning the prior directive; see Case C-79/13, *Saciri* [2014], EU:C:2014:103 and for analysis of this point more broadly E. Tsourdi, 'EU Reception Conditions: A dignified standard of living for asylum seekers?', in: V. Chetail, P. De Bruycker & F. Maiani (eds), *Reforming the Common European Asylum System: The New European Refugee Law*, Brill/Nijhoff Publishers 2016, p. 271, 299-302.

tance schemes or access to the labour market⁷⁴ was based to a great extent on political, rather than on fact-based arguments. It is not clear to which side the scales would have tilted had such research and facts been introduced to the debate; the fact is that important policy decisions were made in their absence, based largely on speculation and political sentiment.

In terms of adherence with fundamental rights, the recast Directive brought about moderate improvements, which largely take into account the evolving jurisprudence of Strasbourg and Luxembourg Courts in this area. Such an example, coming from other areas than the ones examined, is the explicit mention in the text of the recast Reception Conditions Directive of its applicability in territorial waters as well as transit zones, an element that was missing from the prior version of the Directive.

Nevertheless, the instruments miss the opportunity to establish a 'higher EU threshold'. Such would have been the case, for example, had the Commission's proposal to entirely exclude the possibility for Member States to detain unaccompanied minors under any circumstance, been retained.⁷⁵ Such a prohibition already exists in some Member States; however, at EU level, the relevant provision was watered down during the negotiations.

Still, the greatest challenge in the area of reception conditions arises not from the amended text itself, but from the non-implementation, or further dilution, of standards in practice. In a context of increased irregular arrivals and rise in first-time asylum applications, worrying trends related directly with the area of reception conditions can be observed. End November 2015, Sweden announced that it would no longer be able to guarantee shelter for all people arriving on the territory and a number of asylum seekers were consequently forced to live in sports halls, corridors and waiting rooms.⁷⁶ Other EU Member States and associated states have started bringing to the forefront the practice of seizing asylum seekers assets as a contribution to their reception costs.⁷⁷ In Italy and Greece, where the so-called hotspot approach is being implemented, the first signs of operationalisation reveal practices of systematic detention of all arriving

⁷⁴ See also M. Garlick, 'Asylum-Seekers and People in Need of International Protection', in: E. Guild, S. Carrera & K. Eisele (eds), *Social Benefits and Migration: A Contested Relationship and Policy Challenge in the EU*, CEPS 2013, p. 62.

⁷⁵ See COM(2008)815 final, Article 11(1).

⁷⁶ See ECRE, *Sweden Tightens Asylum Rules*, 27 November 2015, available at: <http://www.ecre.org/component/content/article/70-weekly-bulletin-articles/1293-sweden-tightens-asylum-rules.html> and Swedish Migration Board, *Great need for housing, despite fewer applicants*, 5 February 2016, available at: <http://www.migrationsverket.se/English/Private-individuals/Protection-and-asylum-in-Sweden/Nyheter/2016-02-05-Great-need-for-housing-despite-fewer-applicants.html>.

⁷⁷ See for analysis of the compatibility of this practice with the recast directive, K. Groenendijk, 'Can Member States Seize Asylum Seekers' Assets', *EU Law Analysis*, 24 January 2016, available at: <http://eulawanalysis.blogspot.be/2016/01/can-member-states-seize-asylum-seekers.html>.

asylum seekers.⁷⁸ On the 22nd of March 2016, UNHCR officially suspended part of its operations in several hotspots on Greek islands. As the UN agency stated this was: 'in line with our policy on opposing mandatory detention'.⁷⁹ These are but a few examples of current state practice that diverges from the standards of the recast Directive. There is an ever-increasing number of challenges in providing a dignified standard of living for asylum seekers. Despite its imperfections, the recast instrument contains key guarantees and enounces standards that are instrumental in ensuring the right to human dignity of asylum seekers in the EU.

⁷⁸ See A. Drakopoulou, 'Hotspots: the case of Greece', in: Odysseus Academic Network (ed.), *Searching for Solidarity in EU Asylum and Border Policies: A Collection of Short Papers*, ULB 2016, p. 19.

⁷⁹ See UNHCR, *UNHCR redefines role in Greece as EU-Turkey deal comes into effect*, 22 March 2016, available at: <http://www.unhcr.org/56f10d049.html>.

3. Problem Issues: Detention of Vulnerable Persons and Persons with Special Reception Needs

Karina Franssen

In my contribution I will touch upon two issues: detention of vulnerable persons and vulnerable persons with special reception needs. I will first address the provisions on vulnerable persons with special reception needs and then go into the detention provisions. By doing so, I will try to demonstrate that it is rather odd to have special provisions for vulnerable persons with special reception needs while at the same time provisions allow for the detention of vulnerable persons.

1. PROVISIONS FOR VULNERABLE PERSONS WITH SPECIAL RECEPTION NEEDS

In its **evaluation report of the 2003 Reception Conditions Directive**, the European Commission identified deficiencies in addressing special needs in Member States as being the most serious concern in the area of reception of asylum seekers.¹ Therefore *the 2008 Proposal* ensured that Member States shall take into account the specific situation of persons with special needs in their national legislation.² It then stated that vulnerable persons, like minors, unaccompanied minors, disabled people etcetera shall always be considered as people with special needs. Member States therefore had to introduce national procedures in order to immediately identify such needs and to indicate the nature of these needs. Member States also have to ensure support for these persons during the entire asylum procedure and shall provide for appropriate monitoring of their situation. *The 2011 Proposal* changed or added two elements: 1) Member States were to establish mechanisms (instead of procedures) with a view to identify whether the person is a vulnerable person and if so, if he needs special reception needs and 2) these mechanisms should be initiated within a reasonable time period after an asylum application has been made.³

In *the current 2013 Reception Conditions Directive* (hereinafter: the Directive) Articles 21-25 contain provisions for vulnerable persons.⁴

¹ COM(2007) 745, 26 November 2007.

² COM(2008) 815, 3 December 2008.

³ COM(2011) 320, 1 June 2011.

⁴ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), *OJ* 2013 L180/96.

Who?

The first question that needs to be answered is the who question. Who are these vulnerable persons? Article 21 first lists a few categories which can be regarded as vulnerable persons. This list is not exhaustive given the words 'such as'. If a person has to be regarded as vulnerable, Member States are obliged to take into account his/her specific situation.

How?

Second question is the how question. According to Article 22 of the Directive, Member States have to assess whether the vulnerable applicant has special reception needs and if so, what these needs are. See for a parallel: Article 24(1) of the Asylum Procedures Directive.⁵ This assessment should be fair and take place within a reasonable period of time after the application is made. According to Article 17(1), material reception conditions should be made available from the moment someone makes an asylum application. It need not take the form of an administrative procedure, but procedural guarantees such as the right to be heard and the right to a motivated decision have to be taken into account. If it becomes clear what a vulnerable person needs, a Member State has to provide him/her with support during the entire asylum procedure and provide for appropriate monitoring of the situation.

What?

This brings us to the third question. What are their needs?

Articles 23-25 contain special provisions with regard to three categories of vulnerable persons: 1) minors 2) unaccompanied minors and 3) victims of torture and violence.

Ad 1) Minors (Article 23)

Article 23 states that the best interests of the child shall always be a primary consideration for Member States. In assessing these best interests, a Member State has to take into account: a) family reunification possibilities, b) minor's well-being and social development, c) safety and security considerations and d) the views of the minor.⁶

Further obligations for Member States are:

⁵ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), *OJ* 2013 L 180/60. Article 24(1) states that special procedural needs should be identified and assessed in order for an asylum seeker to effectively access the procedure and substantiate his claim.

⁶ See Article 23(2).

- to ensure that children enjoy a standard of living adequate for their physical, mental, spiritual, moral and social development (par. 1);
- to ensure that minors have access to leisure activities (par. 3);
- to ensure that minors have access to rehabilitation services and that appropriate mental health care is developed and qualified counselling is provided when needed (par. 4);
- to ensure that minors are lodged with family members, provided it is in the best interest of the minors concerned (par. 5).

Ad 2) Unaccompanied minors (Article 24)

Unaccompanied minors have the right to:

- a representative who represents and assists him/her (par. 1);
- accommodation with either adult relatives or foster families or in accommodation centres with special provisions for minors or other accommodation suitable for minors (par. 2)⁷;
- tracing of family members (par. 3)⁸;
- appropriately trained people working with them (par. 4).

Ad 3) Victims of torture and violence (Article 25)

Victims of torture and violence have the right to:

- necessary treatment for damage caused, in particular access to appropriate medical and psychological treatment or care (par. 1);
- appropriately trained people working with them (par. 2).

A last and possible fourth question is: can they be detained? Before I will turn to that question I will first say something about the practice.

Practice

If one speaks about adequate reception conditions for asylum seekers with special reception needs the *Tarakhel v. Switzerland* judgment by the European Court of Human Rights (hereinafter: ECtHR) should be mentioned.⁹ This was a Dublin case in which the ECtHR held that the Swiss authorities had to obtain assurances

⁷ According to Article 24(2) an exception can be made for unaccompanied minors aged 16 or over. They can be placed in accommodation centres for adult applicants, if it is in their best interests.

⁸ On the basis of Article 24(2) and Article 6(4) of the Dublin III Regulation (Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), *OJ* 2013 L180/31) one could argue that Member States are not only under an obligation to trace family members, but also to trace relatives. Both articles refer to family members as well as relatives.

⁹ ECtHR, *Tarakhel v Switzerland*, Appl. No 29217/12, 4 November 2014.

from Italian authorities that upon arrival in Italy the family should be received in facilities and conditions adapted to the age of the children and that the family should be kept together. Unfortunately, in most Member States this ruling is only applied to families with children and not to other vulnerable persons. According to the most recent Asylum Information Database (AIDA) annual report (2014-2015), in most Member States, families with children are not housed in separate facilities.¹⁰ On the other hand, unaccompanied minors are offered special accommodation. The AIDA annual report of the year before (2013-2014) revealed that in most Member States the identification of special needs remains more a matter of ad hoc administrative arrangements than systems with sound legal guarantees laid down in law.¹¹ When I discussed this issue with civil servants of the Dutch Ministry of Security and Justice they assured me that the Central Agency for the Reception of Asylum Seekers (COA) – which is responsible for reception of asylum seekers in the Netherlands – will take care of such an assessment in practice. When I mentioned that a practice is not a correct implementation of a Directive provision,¹² they asked me whether I had examples of worrying practices. If the answer would be negative, there was nothing to worry about.

2. DETENTION OF VULNERABLE PERSONS

I will now turn to the second issue: the detention of vulnerable persons and of persons with special reception needs. With a view to the detailed provisions on vulnerable persons with special reception needs as stated above, it is very difficult to believe that detention of this group would still be possible.

Some background first. *The 2008 Commission Proposal* was rather firm with regard to detention of vulnerable persons and persons with special needs. With regard to the first group (vulnerable persons) two categories were distinguished: minors and unaccompanied minors. Regarding minors the proposal indicated that they should not be detained unless it is in their best interest (only after an individual examination of their situation) and with regard to unaccompanied minors it was stated that they should never be detained. With regard to persons with special needs the proposal indicated that they should not be detained unless an individual examination of their situation by a qualified professional certifies that their health, including their mental health, and well-being, will not significantly deteriorate as a result of the detention.

¹⁰ Asylum Information Database (AIDA), Common asylum system at a turning point: Refugees caught in Europe's solidarity crisis, Annual Report 2014-2015, p. 90, www.asylumineurope.org.

¹¹ Asylum Information Database (AIDA), *Mind the Gap. An NGO Perspective on Challenges to Accessing Protection in the Common European Asylum System*, Annual Report 2013-2014, p. 75, www.asylumineurope.org.

¹² See a.o. Court of Justice, case C-366/89, *Commission of the European Communities v Italian Republic*, Jur. 1993, p. I-4201, 2 Augustus 1993.

In the amended 2011 Proposal it was formulated as a principal rule that in all cases vulnerable persons shall not be detained. An exception, however, could be made if it was established that their (mental) health and well-being would not significantly deteriorate as a result of the detention. Specifically regarding minors, the proposal, rather contradictorily, said first that minors should not be detained (until it is in his/her best interest) and then stated that detention of minors should be a measure of last resort. This is to my opinion rather confusing. What is the principal rule: detention is possible or detention is not possible? The text of the proposal had been watered down regarding unaccompanied minors: where the first proposal stated that unaccompanied minors should never be detained it now stated that their detention is possible but only in particularly exceptional cases.

If we look at the text of the *current Recast Directive* (Article 11) it becomes clear that the principal rule as formulated in the amended 2011 Proposal that in 'all cases vulnerable persons should not be detained, unless...' has disappeared. Article 11 now states that detention is possible, but that the (mental) health of vulnerable persons shall be of primary concern to national authorities (par. 1). This is a rather weak obligation as numerous researches have demonstrated that in *all cases* detention has a devastating effect on the mental and physical health of an individual.¹³ This is also increasingly acknowledged by the jurisprudence of the ECtHR.¹⁴ Moreover, it leaves a broad discretion for Member States. This also applies to the obligation of a Member State to ensure *regular monitoring* and *adequate support* when they detain vulnerable persons. What does that mean? It is striking that e.g. *adequate support* has not been defined in the Directive. However, in my opinion, this can be used as an argument against the detention of vulnerable persons. If one reads *adequate support* in conjunction with Article 22(1) one could argue that adequate support is that kind of support needed to meet the vulnerable applicant's special reception needs. This by definition cannot be reconciled with the practice of detention. A state cannot provide vulnerable persons with adequate support for their special reception needs while in detention.

Regarding minors, Article 11(2) now states, like the amended proposal, that minors shall be detained only as a measure of last resort after it has been established that other less coercive measures cannot be applied effectively. Detention should take as short as possible and efforts should be made to release the minors and place them in an accommodation suitable for minors. Furthermore, the minor's best interest has to be a *primary consideration* for Member States. It is hard

¹³ JRS Europe, *Becoming Vulnerable in Detention*, Civil Society Report on the Detention of Vulnerable Asylum Seekers and Irregular Migrants in the European Union (The DEVAS Project), June 2011; European Council on Refugees and Exiles (ECRE), *Reception and Detention Conditions of applicants for international protection in light of the Charter of Fundamental Rights of the EU*, January 2015.

¹⁴ See for example ECtHR, *Kangaratsnam v Belgium*, Appl. No 15297/09, 13 December 2011 and ECtHR, *Popov v France*, Appl. No 39472/07, 19 April 2012.

to see how detention will ever be in the minor's best interest given their (double) vulnerability and specific needs.

Regarding unaccompanied minors, like the 2011 Proposal, Article 11(3) says that unaccompanied minors should only be detained in exceptional circumstances and that all efforts should be made to release them as soon as possible. It remains unclear, however, what these exceptional circumstances are and at which moment in time all efforts are being made. A few other guarantees are mentioned: no detention in prison facilities, but (as far as possible) in institutions provided with personnel and facilities that take into account the needs of persons of their age and 'accommodation' separate from adults. Unanswered questions in this regard are: how can Article 24(2) according to which unaccompanied minors must be accommodated either with adult relatives, a foster family or in accommodations specifically designed/suitable for minors be reconciled with putting them in detention? Can detention be regarded as suitable accommodation and is this in the best interest of the child (Article 23 (1))?

The Directive further mentions as vulnerable persons or persons with special reception needs families¹⁵ (right to separate accommodation with sufficient privacy) and female applicants¹⁶ (right to accommodation separately from men, unless family and all parties agree). However, these rights (plus the right minors have to leisure activities) can be derogated from in case the applicant is detained at a border post or in a transit zone.¹⁷

Practice

According to the AIDA annual report 2013-2014 in most of the covered Member States (15 in total) minors in families as well as unaccompanied minors are rarely or never detained in practice with the exception of Bulgaria, Greece, Malta and Poland (with regard to minors in families). This is a positive development. However, practices and safeguards continue to vary widely regarding *grounds* and *conditions*.

Only 4 Member States (Belgium, Bulgaria, Hungary and Italy) have legal provisions in place prohibiting detention of unaccompanied minors, although in Bulgaria there was an act pending providing for the detention of unaccompanied minors. In 6 Member States (Austria, Cyprus, Greece, the Netherlands, Sweden and the United Kingdom) detention is not prohibited by law, but only allowed in exceptional circumstances. In Greece and Cyprus, however, unaccompanied minors are still being detained.

What is also problematic, is that some countries wrongfully assess unaccompanied minors as adults even if they carry documentation with them (Italy, Greece) or detain them pending an age assessment (Belgium, Malta).

¹⁵ Article 11(4).

¹⁶ Article 11(5).

¹⁷ Article 11 (6).

Detention facilities also vary between Member States. Only in Austria special detention facilities exist. In most cases, however, children are accommodated separately from adults.

In the countries where children are detained access to education during detention is often problematic and not guaranteed in practice (United Kingdom, France).

3. CONCLUSION

As I indicated at the start of this contribution, it is rather odd that in one Directive special provisions for vulnerable persons with special reception needs are being introduced while at the same time other provisions of that Directive allow for the detention of these vulnerable persons. By placing (unaccompanied) minors and other vulnerable persons in detention, Member States, in my opinion, are acting in contradiction with the core principles mentioned in Article 21(1) and 23(1) of the 2013 Reception Conditions Directive.

4. A View from Outside the EU Reception *Acquis*: Reception Rights for Asylum Seekers in Ireland

Liam Thornton¹

1. INTRODUCTION: SITUATING IRELAND WITHIN EU RECEPTION LAW

Only indirectly impacted by common European Union (EU) reception standards, Ireland presents an interesting case study on the reception rights for asylum seekers. The legal obligations upon Ireland as regards reception conditions² for applicants for international protection,³ who are not subject to detention,⁴ are dominated by domestic legal obligations. Ireland does not have any obligations under either the Reception Conditions Directive 2003 ('the RCD 2003') or the Recast Reception Conditions Directive 2013 ('the RRCD 2013').⁵ If Ireland had opted into the RCD 2003 and/or the RRCD 2013, then a number of clear legal rights would inhere within applicants for international protection, including:

- Recognition of a dignified standard of living;⁶
- Highly circumscribed freedom of movement rights;⁷
- The right to be provided with some form of shelter;⁸

¹ The author thanks all the participants at the Reception Directive Seminar held in the Centre for Migration Law in Radboud University in December 2015, whose keen insights and formal and informal feedback greatly assisted in finalising this chapter. The usual proviso remains; any errors are mine alone.

² I find the language of 'reception conditions' for asylum seekers to be problematic. While I have a preference for utilising the phrase 'socio-economic rights', given that this language of 'reception' has become so dominant, and given that this chapter is assessing the degree to which the agreed European Union standards are reflected within Ireland, I reluctantly will use the language of 'reception'. For a further analysis, see Liam Thornton, *Law, Dignity & Socio-Economic Rights: The Case of Asylum Seekers in Europe*, FRAME Working Paper No. 6, January 2014, available at <http://www.fp7-frame.eu/working-papers/> and Liam Thornton, 'The Rights of Others: Asylum Seekers and Direct Provision in Ireland', *Irish Community Development Law Journal* 2014, p.22-44.

³ In this chapter, the phrase asylum seeker is utilised in the sense of a person who has formally made a claim for refugee status and/or subsidiary protection status, but whose claims(s) have yet to be determined. In this regard, while Ireland may offer social supports for those claiming a discretionary leave to remain (under Section 3 of the Immigration Act 1999), such claims are strictly outside the scope of this chapter.

⁴ In general, Ireland does not routinely detain asylum applicants, hence the decision not to focus on detention issues within this chapter.

⁵ Articles 1 and 2 and Article 4a(1) of Protocol No 21 of the Treaty on the Functioning of the European Union (TFEU) [2012] O.J. C326/49; Preamble Recital 20 RCD and Preamble Recital 33 RRCD.

⁶ Preamble recital 7 RCD and Preamble recital 9 and 10 RRCD.

⁷ Article 7 RCD/Article 7 RRCD.

- Material reception conditions;⁹
- A circumscribed right to education for children under 18;¹⁰
- Protection of particularly vulnerable asylum seekers;¹¹
- A limited right to work.¹²

Given the seeming lack of EU legal obligations upon Ireland under the RCD 2003 or RRCD 2013, it is important to situate reception conditions for asylum seekers within their political, legal and societal contexts. Recent studies have argued that EU Member States have not downgraded reception conditions (or procedural rights) of those seeking asylum in light of communalised European standards.¹³ Therefore, to what extent have common standards impacted, or otherwise, on Ireland, who is not wholly part of the *acquis communautaire* of EU reception law? In this regards, statistics on numbers seeking asylum within Ireland in comparison with EU statistics, may be instructive as regards the supposed 'scale of problem' identified within political discourses that are discussed later in this chapter.

Table 1. First Time Protection Applications in Ireland¹⁴

| Year | Total Applications* for International Protection in the EU | Ireland (as a percentage of total Applications in the EU) |
|------|--|---|
| 2015 | 1,321,600 | 1,480 (0.11%) |
| 2014 | 626,960 | 1,440 (0.23%) |
| 2013 | 431,090 | 946 (0.22%) |
| 2012 | 335,290 | 956 (0.28%) |
| 2011 | 309,040 | 1,290 (0.41%) |

* The 2013 -2015 figures include Croatia, the figures from 2011-2012 exclude Croatia.

⁸ Article 14 RCD/ Article 18 RRCD.

⁹ Article 13 RCD/Article 17 & 18 RRCD.

¹⁰ Article 10 RCD/Article 14 RRCD. In relation to the possibility of separate education for children of asylees (or possibly asylum seekers themselves), Chalmers comments that educational provision 'is only on terms of 1950s Mississippi', D. Chalmers (editorial) 'Constitutional treaties and human dignity', (2003) 28(2) *European Law Review*, p. 147.

¹¹ See Article 16-19 RCD and Article 21-25 RRCD.

¹² Under the RCD, a right to work was granted (Article 11(2) RCD) if an asylum applicant's first instance decision was not rendered within one year. This is to be reduced to 9 months under Article 15 RRCD. Priority can still be given to EU citizens, EEA nationals and 'legally resident' third country nationals.

¹³ Natascha Zaun, 'Why EU asylum standards exceed the lowest common denominator: the role of regulatory expertise in EU decision-making', (2016) 23(1) *Journal of European Public Policy*, p. 136-154 and Ariadna Ripoll Servent & Florian Trauner, 'Do supranational EU institutions make a difference? EU asylum law before and after "communitarization"', (2014) 21(8) *Journal of European Public Policy*, p. 1142-1162.

¹⁴ See generally, Eurostat, Asylum and first time asylum applicants by citizenship, age and sex Annual aggregated data (rounded) (Last update: 18-03-2016) and Office of the Refugee Applications Commissioner (Ireland), *Annual Reports 2011-2015*, Dublin: ORAC 2015.

As can be seen from these figures, the rate of international protection claims is exceptionally small within Ireland when compared to the EU figures. Ireland, as a state on the periphery of Europe 'benefits' geographically from limited protection claims. Despite the small nature of the jurisdiction, it is important to reflect upon and consider the impact of EU law upon Irish domestic law. The chapter has two core aims. First, to consider the degree to which Ireland respects, protects and fulfils (or otherwise) selected reception conditions, including accommodation/shelter, the right to financial allowances, the right to work and withdrawal or reduction of reception conditions for asylum seekers.¹⁵ This will be analysed with respect to the political engagement upon questions on reception for asylum seekers within Ireland that assists in understanding why Ireland does not want to be formally bound by the RCD 2003 and RRCD 2013. Second, the role of the domestic courts in Ireland as regards challenges to Ireland's reception regime for asylum seekers and attempted reliance on European Union law, will be described and considered.

2. RESPECTING, PROTECTING AND FULFILLING RECEPTION RIGHTS FOR ASYLUM SEEKERS IN IRELAND

2.1 Contextualising Reception Conditions for Asylum Seekers in Ireland

In Ireland from the year 2000 onwards, legal and political reactions towards reception conditions for asylum seekers have been punitive in nature. Prior to 2000, asylum seekers reception rights were met within the confines of the Irish welfare state.¹⁶ Overtime, the dominant public and political perception of abuse of the asylum system, contributed to the emergence of state sanctioned difference in welfare entitlements between asylum seekers when compared with Irish citizens and those with a settled residency status.¹⁷ The Irish reception system for asylum seekers is almost entirely based on administrative policies as opposed

¹⁵ In this regard, I will utilise the language of international human rights law and the tripartite duties to respect, protect and fulfil all human rights, whether civil and political, or economic, social and cultural, see further: Liam Thornton, 'Socio-Economic Rights and Ireland', in: Suzanne Egan (ed.), *International Human Rights: Perspectives from Ireland*, Bloomsbury 2015, p.171-198, in particular p. 178-180.

¹⁶ For a full exploration of the previous inclusiveness of asylum seekers within core Irish welfare law provisions, see Liam Thornton, 'Upon the Limits of Rights Regimes: Reception Conditions of Asylum Seekers in the Republic of Ireland', (2007) 24(2) *Refuge, Canada's Journal on Refugees*, p. 86-100, at p. 88-89 and Claire Breen, 'The Policy of Direct Provision in Ireland: A Violation of Asylum Seekers' Right to an Adequate Standard of Housing', (2008) 20(4) *International Journal of Refugee Law*, p. 611-636.

¹⁷ This is discussed in much more detail in Liam Thornton, 'Social Welfare Law and Asylum Seekers in Ireland: An Anatomy of Exclusion', (2013) *Journal of Social Security Law*, p. 66-88, in particular p. 71-80.

to law.¹⁸ The system of reception for asylum seekers is known generally as 'direct provision'. Direct provision mandates that asylum seekers can be provided with shelter, a small social assistance payment, meeting of medical needs through the public health system, education for those up until the terminal secondary education examination. Therefore, as regards education and medical care, Ireland exceeds the standards set down in the RCD 2003 and RRCD 2013. Instead of the direct provision system being established specifically within legislation by the *Oireachtas* (Irish Houses of Parliament),¹⁹ the system emerged in a more haphazard fashion. Established in 2000, direct provision emerged from administrative circulars from within the Department of Social Protection.²⁰ Over time, legislative changes prohibited asylum seekers from gaining access to a social assistance payment known as 'rent supplement', which some asylum seekers had access to and which permitted them to leave direct provision accommodation and enter the private rental market, with the vast proportion of their rent paid for by the State.²¹ Access to all forms of social assistance payment, other than direct provision allowance, was prohibited initially from 2004,²²

¹⁸ Liam Thornton, 'The Rights of Others: Asylum Seekers and Direct Provision in Ireland', (2014) 3(2) *Irish Community Development Law Journal*, p. 22-42, in particular p. 23-26. The one exception being the right to education for school-going children, whereby there is an obligation for children to attend school until at least 16 years of age and a right for children to be educated until (generally) the age of 18 or 19, see Section 31 of the Education (Welfare) Act 2000.

¹⁹ The *Oireachtas* consists of a Lower House of Parliament, called Dáil Éireann and an Upper House of Parliament, Seanad Éireann. The Dáil is elected by popular vote. The Seanad is a vocational appointment system, with a limited public vote for its members. In general, the core power of the Seanad under the Irish Constitution is simply to delay legislation. See further, Tanya Ní Mhurthile, Catherine O'Sullivan & Liam Thornton, *Fundamentals of the Irish Legal System: Law, Policy and Politics*, Roundhall 2016, Chapter 4 and Chapter 7.

²⁰ Department of Social and Family Affairs (DSFA), Circular 04/00 (10 April 2000) and DSFA, Circular 05/00 (15 May 2000). Circular 05/00 was replaced by Circular 02/03 (30 May 2003).

²¹ Section 13 of the Social Welfare (Miscellaneous Provisions) Act 2003 inserted section 174(3) and (4) into the Social Welfare (Consolidation) Act 1993 and prevented payment of rent allowance to those unlawfully in the State and also to those who had made an application for refugee status. This section has since been replaced by section 198(3) of the Social Welfare (Consolidation) Act 2005.

²² See now, section 246 of the Social Welfare (Consolidation) Act 2005 (which reflects Section 17 of the Social Welfare (Miscellaneous Provisions) Act 2004). This introduced for the first time a 'habitual residence' condition into Irish law. Mary Coughlan, T.D., Minister for Social and Family Affairs, Vol. 528, *Dáil Debates*, Cols. 57-62, 10 March 2004, who stated that the habitual residence condition was being introduced to '...safeguard our social welfare system from ... people from other countries who have little or no connection with Ireland'. The habitual residence condition was introduced purportedly to prevent citizens of then EU accession states from immediately accessing social assistance payments in Ireland. It was applied as a matter of administrative practice to asylum seekers from 2004 to 2009, see also note below.

and definitively from 2009.²³ So the Irish system for reception of asylum seekers is based on *Oireachtas* exclusion from the social assistance system, but without any positive legal provisions specifically establishing direct provision on a legislative footing. The reasons for this will be discussed in more detail in Section 2.3 of this chapter. There is no obligation upon asylum seekers to enter the system of direct provision, and a 'snapshot study' indicated that about 54% of protection applicants, including those seeking humanitarian leave to remain (on 01 February 2015) had not entered the system of direct provision and may have been meeting their own reception needs.²⁴

That individuals may be excluded from a countries welfare system while they are asylum seekers is not all that unusual within the European Union. When direct provision was introduced in Ireland, emphasis was placed by politicians and administrators that it would be a short-term time limited system, that asylum seekers would generally only endure for a 6-month period.²⁵ What is unusual to a degree is the length of time that individuals remain within the direct provision system, due to significant delays in finalising status determination decisions. The significant administrative deficiencies within Ireland's refugee and subsidiary protection and humanitarian leave to remain determination processes,²⁶ have meant that individuals and families who have had to opt into the direct provision

²³ A 2009 decision of the Social Welfare Appeals Office (SWAO) Chief Appeals Officer decided that in certain circumstances that those seeking asylum can be regarded as habitually resident and entitled to social assistance. However, the *Oireachtas* acted quickly to explicitly state that asylum seekers can never be regarded as habitually resident in Ireland, and therefore wholly outside the confines of the Irish welfare state. See, Section 15 of the Social Welfare (Miscellaneous Provisions) Act 2009 and for a more detailed explanation of the issues, Liam Thornton, 'Social Welfare Law and Asylum Seekers in Ireland: An Anatomy of Exclusion', (2013) *Journal of Social Security Law*, p. 66-88, in particular p. 84-88.

²⁴ Working Group report to Government on Improvements to the Protection Process, including Direct Provision and Supports to Asylum Seekers (hereinafter the *McMahon Report*, so named after the independent chair, Mr. Justice Bryan McMahon (retired)), para. 3.12.

²⁵ Letter from B. Ó Raghallaigh, Planning Unit, (DSCFA) to P. Wylie, Principle, RIA (DJELR), 20 June 2001 on Health Boards/CWOs time limiting direct provision to a maximum of six months (Correspondence obtained by a Freedom of Information request). See also: Speech by Mr Michael McDowell, T.D., at the publication of the First Annual Report of the Office of the Refugee Applications Commissioner, available at <http://www.inis.gov.ie/en/INIS/Pages/SP07000127>.

²⁶ At the time of copy-editing this chapter (May 2016), Ireland still operates a dual application system for asylum applicants. Asylum seekers must first apply for refugee status, and have this determination (and any appeal) concluded, before consideration will then be given to the subsidiary protection claim (if any). Where neither refugee nor subsidiary protection status is recognised, individuals can apply for consideration of humanitarian leave to remain under Section 3 of the Immigration Act 1999. This tripartite process is due to change when the International Protection Act 2015 comes into force. The timeline for the commencement of the International Protection Act 2015 is, as yet, unclear.

system, will not have their claims determined for a significant period of time as indicated in Table 2 below.

*Table 2. Time Spent by Asylum Seekers in the Direct Provision System (as of September 2015)*²⁷

| | |
|--|------|
| 1 Year or less | 1891 |
| 1-2 Years | 623 |
| 2-4 Years | 692 |
| 4-6 Years | 496 |
| 6 Years + | 982 |
| Total Asylum Seekers ²⁸ in Direct Provision | 4684 |

As of February 2015, the *McMahon Report on the Protection Process and Direct Provision* (hereinafter '*the McMahon Report*') identified 7,937 persons who had entered the country as asylum seekers in previous years and who remained within the broad asylum/protection system. There were 3,876 persons within the protection process, awaiting determination on whether they met the criteria for a grant of refugee status or subsidiary protection. 1,189 of these persons have been in the protection determination system for 5 years or more.²⁹ 3,343 persons were in the humanitarian leave to remain process, so their claims for protection had been rejected, but they were awaiting a decision from the Irish Nationality and Immigration Service (INIS) as to whether they would be granted humanitarian leave to remain. 2,530 persons had been in the leave to remain process for 5 years or more.³⁰ 718 persons were subject to a deportation order, with 628 persons having an outstanding deportation order for 5 years or more.³¹ A core political narrative that has emerged over many years, is that court challenges to the decisions of the status determination bodies and INIS are delaying finalisation of asylum and leave to remain claims. The Irish Minister for Justice, Frances Fitzgerald, responding to a parliamentary question in 2014, stated:³²

'in very many instances the delay in finalising cases is due to applicants challenging negative decisions by initiating multiple judicial reviews at various stages

²⁷ See, Reception and Integration Agency, *Monthly Report: September 2015*, RIA 2015, p. 19. Statistics have not been published since September 2015, which in itself is quite unusual.

²⁸ The Reception and Integration Agency do not provide a break-down of the stage that direct provision accommodation residents are at as regards their protection or leave to remain claims. Therefore, this figure does include those whose claims for protection have been decided negatively, but who may be applying for leave to remain in Ireland, or have an outstanding deportation order against them.

²⁹ *McMahon Report*, para. 3.8.

³⁰ *Ibid.*

³¹ *Ibid.*

³² Minister Frances Fitzgerald TD, Written Response to Question on the Direct Provision System, *Dáil Debates* [unrevised], Wednesday 18 June 2014.

of the process. Thousands of applications cannot be finalised because of these legal challenges...'³³

However, the *McMahon Report* highlights the significant level of settlement and successes against the status determination bodies in Ireland on the basis of a failure to follow fair procedures or to in some way fully examine an asylum applicants claim.³⁴ There were 662 decisions by the Irish superior courts on judicial reviews against the first instance decision maker in refugee and subsidiary protection claims: the Office of the Refugee Applications Commissioner (ORAC).³⁵ 390 (58.91%) of these challenges were unsuccessful or withdrawn. 103 (11.56%) of the challenges were successful and 92 (13.90%) of these challenges were settled.³⁶ This in essence means that just over one-quarter of all judicially reviewed ORAC decisions were set aside, by means of settlement or court decision, between 2009 and 2014. As ORAC is a first instance decision making body, there is a general expectation that applicants will use the appeal mechanisms provided to the Refugee Appeals Tribunal (RAT), rather than seeking judicial review before the Irish superior courts.³⁷ Of the 1,420 judicial reviews to Refugee Appeals Tribunal decisions determined by the Irish superior courts between 2009 and

³³ This has been a well-established narrative over success Ministers for Justice. See the speech by the former Minister for Justice, Equality and Law Reform, Mr. Michael McDowell T.D., at the publication of the First Annual Report of the Office of the Refugee Applications Commissioner, available at <http://www.inis.gov.ie/en/INIS/Pages/SP07000127> [last accessed, 16 May 2016]; Mr. McDowell's response to a parliamentary question from Deputy Michael D. Higgins, *Dáil Éireann Debates*, Vol. 623, Col. 1131- 1137 (05 July 2006). Mr. McDowell referred to the 'the level of deliberate abuse of our current [asylum] processes'. See also, DJELR, 'McDowell takes firm action to deal with influx of Romanian asylum seekers', Press Release, 18 January 2007. Minister Fitzgerald's predecessor, Alan Shatter T.D, stated (Seanad Éireann Debate, 23 October 2013) 'it is worth noting that a substantial number of those residing for long periods within the direct provision system, are adults living with their children who have challenged in the courts by way of the judicial review process decisions made refusing applications for asylum and/or permission to remain in the state and whose cases await hearing or determination. There are presently approximately 1,000 such cases pending before the courts.'

³⁴ These statistics are taken from, *McMahon Report*, para. 3.96. See also, Table 7 (Appendix 6). 341 of the 9,434 negative decisions of ORAC were subject to judicial review proceedings between 2009 and 2014.

³⁵ In this regard, the *McMahon Report* states that 662 judicial review proceedings were determined against ORAC between 2009-2014, some of these reviews would have been filed prior to 2009, but determined after 2009, see Table 7 (Appendix 6). See also, *McMahon Report*, para. 3.97. The Refugee Appeals Tribunal (RAT) issued 8,392 negative decisions between 2009-2014. 1,293 (15.41%) of these negative decisions were subject to legal proceedings.

³⁶ 77 (11.63%) of the applications in Table 7 are labelled 'Other applications', it is not clear what this means.

³⁷ For a judicial explanation why this should be the case, and that applicants should have errors of law/jurisdiction/bias etc. first determined by the Refugee Appeals Tribunal, see *P.D. (Zimbabwe & Malawi) v Minister for Justice & ORAC* [2015] IEHC 111.

2014,³⁸ 819 (57.68%) were unsuccessful or withdrawn. 166 of the proceedings (11.69%) were successful. 288 cases (20.28%) were settled.³⁹ Of the RAT decisions challenged by means of judicial review, over 30% of these judicial reviews (including threats of judicial review) resulted in the case going back to RAT for a fresh determination.

With this context in mind, attention now turns to the modalities for the protection of reception rights for asylum seekers in Ireland. In doing so, comparisons are drawn between the standards set down in the RRCD 2013 and analysis is provided in examining whether, in essence, Ireland complies in spirit with the RRCD 2013.

2.2 Rights Compared: Ireland and EU Laws on Reception Conditions

2.2.1 *The right to accommodation/shelter and food*

Asylum seekers have a non-legislative right to shelter in Ireland. Rather than this right to shelter being provided under legislation, it emerges from practice set down within administrative circulars⁴⁰ and from information issued by the Reception and Integration Agency (RIA).⁴¹ If an asylum seeker chooses not to enter into the accommodation centres, then the asylum seeker is responsible for meeting her own shelter needs and will not be entitled to the social assistance payment, known as direct provision allowance. Ireland operates a systems of dispersal to accommodation centres for asylum seekers. In Ireland, asylum seekers are dispersed to direct provision centres, on a no-choice basis.⁴² If an asylum seeker refuses to be dispersed to one of the 34 accommodation centres, RIA will not provide any accommodation supports.⁴³ There have been no court challenges to this dispersal system in Ireland and little is known as to how the decision to disperse particular asylum seekers is taken. RIA have noted that when making decisions on where to disperse an individual asylum seeker (and any other family members) the *McMahon Report* states that 'vulnerabilities can be identified and taken into account in decisions on dispersal'.⁴⁴ However, the *McMahon Report* also states that asylum applicants '... do not have any input as such into the [dispersal] decision-making process'.⁴⁵ Accommodation is provided

³⁸ As with the ORAC statistics, these must include judicial reviews lodged prior to 2009, but determined after this date, see Table 8 (Appendix 6).

³⁹ There are 147 'Other Applications', it is not clear what this means within the *McMahon Report*.

⁴⁰ See now, Circular 02/03 (30 May 2003), obtained via a Freedom of Information request.

⁴¹ RIA, *Direct Provision Accommodation and Reception Centres: House Rules and Procedures (Revised)*, RIA 2015.

⁴² RIA, *Reception, Dispersal and Accommodation*, RIA 2016, available at www.ria.gov.ie.

⁴³ RIA, *Geographical Dispersal of Accommodation Centres*, RIA 2013, http://www.ria.gov.ie/en/RIA/Pages/RIA_Accommodation_Centres.

⁴⁴ *McMahon Report*, para.3.301.

⁴⁵ *McMahon Report*, para 4.22. The *McMahon Report* did not recommend any system for allowing asylum seekers to challenge the dispersal system (see para. 4.134).

within centres, where families (consisting of two parents and child/children) will be provided with one room;⁴⁶ single parents may have to share with another single parent;⁴⁷ single applicants will usually share dormitory style rooms.⁴⁸ Food is also provided at set times, and there is limited cooking facilities available for asylum seekers to cook their own food in most accommodation centres.⁴⁹ This communal accommodation and food provision mirrors to a degree the obligations under the RRCD 2013. Article 18 RRCD provides that where housing is provided in kind, it can include 'accommodation centres'.⁵⁰ The requirements under Article 17 RRCD on material reception conditions, permit (amongst other things) food to be provided to asylum applicants. This must guarantee 'subsistence and protect their physical and mental health'.⁵¹ In a 2013 Report, Barry argued that the inability of the vast majority of accommodation centre residents to prepare their own food impacted, coupled with the length of time in accommodation centres, negatively impacted on the physical and mental health of asylum seekers.⁵² As one participant in Barry's study explained,

'Frankly I feel like I am eating in Guantanamo (reference to a prison) – security people are standing there with walkie radios talking to each other ... it is not a place you would wish to eat. You tense up – you know? That is why I am not emotionally ready to eat. The security standing there makes me nervous. They (security) turn off the light (in the dining room) at seven o'clock even if people are still eating as dinner is 5pm to 7pm. We don't have anywhere else to go – they don't have any patience to let people finish their meals. You hurry to try to finish or don't finish ... I sometimes think if I was a guard at this camp (Direct Provision centre) in my country would I do in the same way? If you put off the lights that gives a message – I interpret that as, "if you are finished or not. Leave, get out, go now". They also have security cameras in there and I don't know why – maybe they have a reason? I would like to know the reason ...'⁵³

Ní Shé and others in a study on migrant and asylum seeking families referred to an activity that had been conducted with children who were resident in direct

⁴⁶ RIA, *Direct Provision Accommodation and Reception Centres: House Rules and Procedures (Revised)*, RIA 2015, p. 17-18.

⁴⁷ RIA, *Direct Provision Accommodation and Reception Centres: House Rules and Procedures (Revised)*, RIA 2015, p. 17-18.

⁴⁸ RIA, *Direct Provision Accommodation and Reception Centres: House Rules and Procedures (Revised)*, RIA 2015, p. 17-18.

⁴⁹ RIA, *Direct Provision Accommodation and Reception Centres: House Rules and Procedures (Revised)*, RIA 2015, p. 9.

⁵⁰ Article 18(1)(b) RRCD.

⁵¹ Article 17(2) RRCD.

⁵² Keelin Barry, *What's Food Got to Do With It: Food Experiences of Asylum Seekers in Direct Provision*, NASC 2014.

⁵³ Keelin Barry, *What's Food Got to Do With It: Food Experiences of Asylum Seekers in Direct Provision*, NASC 2014, p.35.

provision accommodation centres. In research undertaken through consultations with children, a group of children were asked to design homes.

'Not one of the thirteen children designed homes with a lounge or kitchen. For them, as their designs indicated, the priority was a separate bedroom.'⁵⁴

The degree of disempowerment from engaging in an activity as important as food preparation for individuals and families should not be dismissed. Other studies,⁵⁵ have noted the importance of family and individual food preparation and levels of disempowerment that such an intimate aspect of human dignity can be interfered with to such a significant degree, over a prolonged period of time. Recommendations from the *McMahon Report* emphasised the importance of privacy and the ability to cook within centres.⁵⁶ The (former) Minister for State with responsibility for reforming direct provision accommodation centres has stated,

'I have seen, smelt and tasted the desperation in those centres and know exactly what is happening in them.'⁵⁷

As is explored in Section 2.3 below, the desperation of those within the direct provision system has not proved enough for there to be any meaningful reforms in this area.

2.2.2 *The right to financial allowances (social assistance payment)*

Article 17(5) RRCD 2013 states that *where*⁵⁸ Member States provide financial allowances or vouchers, this *shall* be determined with reference to the levels of

⁵⁴ Éidín Ní Shé et al., *Getting to Know You: A Local Study of the Needs of Migrants, Refugees and Asylum Seekers in County Clare*, UL/HSE 2007, p. 50. Many years ago, there were toy collections for children residing in direct accommodation centres in Cork. At the Christmas party where the child (not all who would be Christian) were receiving their presents, one child, who was about six years of age, walked over to a play kitchen (that had a hob, a sink etc). The child looked up to a number of us in the group, and asked 'What is this?' with real puzzlement evident on her face. When we tried to explain what the toy was and how you make food in the kitchen, the child continued to be puzzled. The child had never seen her mother or father cook.

⁵⁵ See for example, Zachery Steel et al, 'Psychiatric Status of Asylum Seeker Families held for a protracted period in a remote detention centre in Australia', (2004) 28(6) *Australian and New Zealand Journal of Public Health*, p. 527-536 and Alastair Christie, 'Unsettling the 'social' in social work: responses to asylum seeking children in Ireland', (2003) 8(3) *Child and Family Social Work*, p. 223-231.

⁵⁶ *McMahon Report*, para. 4.75; para. 4.99 and para. 4.102

⁵⁷ (Former) Minister for State with responsibility for New Communities, Aodhán Ó Riordáin, *Direct Provision: Motion, Séanad Éireann Debates*, 27 January 2016.

⁵⁸ Note that this is an imperfect obligation and will only be relevant where a Member State provides such financial allowances, in cash or by way of vouchers.

financial support, levels that are set down in law or by practice, which may be provided to a Member State's own national. However, nothing prevents Member States from providing applicants for international protection with lesser allowances/voucher levels, in comparison to nationals of the Member States. This imperfect duty on Member States stands in contrast with initial Commission proposals that sought to provide a stronger link between minimum acceptable levels of social assistance payment(s) to nationals vis-à-vis applicants for international protection.⁵⁹ In Ireland, asylum applicants have a very limited, non-legislative, right to a social assistance payment known as direct provision allowance. Adult asylum seekers residing in accommodation centres receive € 19.10 per week,⁶⁰ while children residing in accommodation centres (with their families) initially were entitled to a payment of € 9.60 per week, however this was increased to € 15.60 per week in January 2016. This was the first increase to any direct provision allowance payment since 2000. The rates of payment to asylum seekers in Ireland is significantly less than the minimum core social assistance rates for those with a right of residence and who are habitually resident in the State. The minimum social welfare payment rates are set at € 186 per single adult (with additional supplements paid if that individual is in a sexual relationship and cohabiting with her partner, of € 124.80 for a qualified adult and € 29.80 for each qualified child).⁶¹ In addition to the weekly social assistance allowance, asylum seekers (generally, but not always) get two exceptional needs payments of €100 per year to cover clothing and other costs. Parents of school-age children may also be provided with a clothing and a footwear allowance to cover the cost of school clothes. The rationale for this disparity in the level of financial allowance was explained by the former Principal Officer in the Reception and Integration Agency, Noel Dowling, who noted, persons in direct provision have a 'generous and nutritious selection of food...' and:⁶²

'They [asylum seekers] are housed in a very large en suite room measuring 35ft. x 12ft. They have no bills to concern themselves with ... are not concerned about

⁵⁹ See, Commission Staff Working Document accompanying the Proposal for a Directive of the European Parliament and Council laying down minimum standards for reception of asylum seekers (Recast), SEC(2008) 2944, 3 December 2008, p. 18-20; European Parliament, 1st reading of the co-decision procedure, RRCD (07 May 2009), para. 6 and European Commission, *Communication on the action taken on opinions and resolutions adopted by Parliament RRCD*, SP(2009)3616 (June 2009).

⁶⁰ Letter from B. Ó Raghallaigh (DSCFA) to all Health Boards (managerial level), 10 December 1999, confirming the rate of direct provision allowance for asylum seekers. While the letter used the words 'comfort payments', from 2001 onwards the terminology used was 'direct provision allowance'. To avoid confusion, I will use the latter term. See also, Department of Social Protection, *Government announces increase to the Direct Provision Allowance for Children*, 05 January 2016.

⁶¹ Note the lesser rate paid to single persons aged 18 to 25, see Social Welfare (Consolidation) Act 2005 (as amended and supplemented by Statutory Instruments).

⁶² *C.A. & T.A v Minister for Justice* [2014] IEHC 532, paras. 3.18-3.20.

heating the premises ... do not have to concern themselves with paying for food and domestic goods.’

In June 2015, the *McMahon Report* recommended an increase in direct provision allowance for adults and children. It was recommended that the weekly adult rate increase to € 38.74 and weekly child rate to € 29.80 (qualifying child allowance under general social assistance payments).⁶³ There was an additional recommendation for the Department of Social Protection to reinstate Community Welfare Service officials in direct provision centres⁶⁴ and strive for consistency in administration of exceptional and emergency needs payments.⁶⁵ Given the exceptionally small level of increase for children to their direct provision allowance payment, it seems unlikely that there will be further social assistance payment increases.⁶⁶ Given that there is no consensus amongst EU Member States subject to obligations under the RRCD 2013 as to the benchmark that financial allowances for asylum seekers should be set,⁶⁷ it is perhaps not surprising that allowances in Ireland are so low.

The decision of the Court of Justice of the European Union in *Saciri*⁶⁸ as regards the level of financial allowances for asylum seekers utilises the European Union Charter of Fundamental Rights (‘the Charter’) as a base for making its decision. The CJEU note that the RCD 2003, and Article 1 EUCFR require that,⁶⁹

‘... human dignity must be respected and protected ...’.

Once applicants apply for asylum, then the minimum standards established by the RCD 2003 (and RRCD 2013) must be adhered to. The CJEU went on to find that whatever the level of financial aid granted by a Member State,

‘[I]t must be sufficient to ensure a dignified standard of living adequate for the health of applicants and capable of ensuring their subsistence.’⁷⁰

The level of financial allowances must preserve family unity and protect the best interests of the child.⁷¹ Whether this decision might reinforce the Irish govern-

⁶³ *McMahon Report*, para. 51, 5.27 and 5.30 Bullet Point 1.

⁶⁴ *McMahon Report*, para 5.7, 5.19, 5.29 and 5.30 Bullet Point 2.

⁶⁵ *McMahon Report*, para. 5.30, Bullet Point 3.

⁶⁶ A court challenge to the direct provision allowance in *C.A. & T.A v Minister for Justice* [2014] IEHC 532 (on domestic human rights and constitutional grounds), failed.

⁶⁷ European Migration Network, *Synthesis Report: The Organisation of Reception Facilities for Asylum Seekers in Different Member States*, ENM 2015, p. 17-18. The precise details on each countries financial allowances are set out in individual country reports, available from http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/index_en.htm.

⁶⁸ Case C-79/13, *Federaal agentschap voor de opvang van asielzoekers v Selver Saciri and others*, decision of the CJEU, 27 February 2014.

⁶⁹ *Ibid.*, para. 35.

⁷⁰ *Ibid.*, para. 40. See also, para. 46 and para. 48.

ment's caution on being bound by the RRCD 2013, and the possibility that the low level of financial allowances (coupled with the significant length of time that asylum seekers remain in direct provision), could violate dignity, has to be considered.

2.2.3 *The right to work*

Article 15(1) of the RRCD 2013 provides that asylum applicants shall have access to the labour market within 9 months after a first instance application for international protection has been made. This right only accrues where the delay in first instance determination cannot be attributed to the asylum seeker. Member States may give priority to citizens of the European Union and EEA nationals and legally resident third-country nationals.⁷² In Ireland, asylum applicants are legislatively prohibited from seeking or entering any employment, on pain of criminal conviction.⁷³ The International Protection Act 2015 continues to criminalise asylum seekers who seek and/or enter employment.⁷⁴ This is in spite of recommendations from a government appointed independent group in June 2015. The *McMahon Report*⁷⁵ recommended that once the single procedure for determining protection claims is 'operating efficiently' in Ireland,⁷⁶ provision be made for access to the labour market for a protection applicant. This is subject to requirements that the first instance protection decision is not provided within 9 months, and the applicant has been cooperating with status determination bodies.⁷⁷ If this proposal was accepted by the Irish government, this would significantly mirror the obligations of other EU Member States under the RRCD 2013. The right to work, as recommended in the *McMahon Report*, should continue until the end of the protection determination process.⁷⁸ Where an applicant does succeed in entering employment, the State could provide that there may be a proportionate contribution to accommodation and food, if the right to work is

⁷¹ *Ibid.*, para. 41.

⁷² Article 15(2)RRCD.

⁷³ Section 9(4)(b) of the Refugee Act 1996. If an asylum seeker breaches this provision, he/she could be fined and/or face up to six months in prison. A concession was made to asylum seekers who were in the country for a period of at least 12 months prior to 27th July 1999. For more information on the limited and unsuccessful nature of this scheme see, Bryan Fanning et al. *Asylum Seekers and the Right to Work in Ireland*, Dublin: Irish Refugee Council 2000.

⁷⁴ Section 16(3)(b) of the International Protection Act 2015.

⁷⁵ For further background on the *McMahon Report* (in line with usual practice in Ireland, reports are referred to by the name of the Chair. For this group, the Chair was Dr Bryan McMahon, former judge of the Irish High Court), see Liam Thornton, 'A Preliminary Human Rights Analysis of the Working Group Report and Recommendations on Direct Provision', UCD Centre for Human Rights Working Paper, 30 June 2015, available at: <http://ssrn.com/abstract=2685268> [last accessed: 16 May 2016].

⁷⁶ *McMahon Report*, para. 53, para. 5.49, Bullet Point 1.

⁷⁷ *Ibid.*,

⁷⁸ *McMahon Report*, para. 5.49, Bullet Point 2.

provided and exercised.⁷⁹ Given that the single procedure has not yet been enacted in Ireland,⁸⁰ it appears very unlikely that there will be any movement on the right to work for international protection applicants. A recent constitutional and European rights (ECHR and EU law) challenge to the absolute prohibition on protection applicants and the right to work failed. This will be discussed below in Section 3.2 of this chapter.

2.2.4 *Withdrawal or reduction of reception conditions for asylum seekers*

Article 20 of the RRCD 2013 establishes the parameters under which applicants for international protection may have their reception rights reduced or withdrawn. In Ireland, there is no clear legal basis for reducing reception conditions for asylum applicants on grounds similar to those enumerated by RRCD 2013. As regards withdrawal of reception conditions (accommodation and financial allowances), the RIA House Rules set out the broad procedures that will be followed. Abusive or violent behaviour or continuous breach of the House Rules (after individual warnings to desist), may result in an asylum seeker being transferred to another accommodation centre, or expelled coupled with the withdrawal of the financial allowance.⁸¹ In addition, if an asylum seeker has an unexplained absence from an accommodation centre, the space may be reallocated to another asylum seeker and the financial allowance withdrawn.⁸² If an asylum seeker is expelled, after one week the asylum seeker may apply in writing to be re-admitted into the direct provision system.⁸³ In *A.N. v Minister for Justice, Equality and Law Reform*,⁸⁴ A.N. was an Afghan asylum seeker who was expelled from a direct provision accommodation centre due to his behaviour.⁸⁵ Counsel for A.N. argued that he suffered from mental illness and sought an *order man-*

⁷⁹ *McMahon Report*, para. 5.49, Bullet Point 3.

⁸⁰ The International Protection Act 2015 was signed into law in December 2015, however there is no clear timeline for commencement. There were significant criticisms of the amount of time for debate of the International Protection Act 2015 (as well as the substantive content of the Act), see Irish Refugee Council, *New refugee law could store up problems for the future*, 30 November, Dublin: Irish Refugee Council 2015, *Recommendations on the International Protection Bill 2015*, 30 November 2015 and UNHCR Ireland and others, *New Legislation Missed Opportunity to Address Ongoing Issues with Irish Asylum System*, 01 December 2015.

⁸¹ RIA, *Direct Provision Accommodation and Reception Centres: House Rules and Procedures (Revised)*, RIA 2015, p. 35-36.

⁸² *McMahon Report*, para.4.21.

⁸³ RIA, *Direct Provision Accommodation and Reception Centres: House Rules and Procedures (Revised)*, RIA 2015, p.36.

⁸⁴ *A.N. v Minister for Justice, Equality and Law Reform*, Outline Submission of the case by the applicant is on file with the author, no further written submissions were made to the High Court. (The author expresses his appreciation to Michael Lynn BL for making this submission available to him). See also, Mary Carolan, 'Refugee who sleeps in factory seeks subsistence aid', *Irish Times*, Friday, October 24, 2008.

⁸⁵ *A.N. v Minister for Justice, Equality and Law Reform*, Outline Submission, para. 3.

damus requiring the Minister for Justice, Equality and Law Reform to provide 'basic subsistence provision' to the applicant as he was living on the streets without access to shelter or money and was legislatively prohibited from working.⁸⁶ Counsel argued that failure by the state to provide a minimum standard of shelter and food constituted a breach of the constitutional right to bodily integrity⁸⁷ and Article 3 and/or Article 8 of the ECHR.⁸⁸ The applicant was also prepared to argue that the manner in which direct provision accommodation and financial allowance was withdrawn were a breach of fair procedures.⁸⁹ However, before the case could go to trial, the Minister agreed to re-admit Mr. A.N. into the direct provision system.⁹⁰ Expulsion from the direct provision system has been described as 'rare', and there were 49 instances of expulsion between 2004 and 2014.⁹¹ If expelled, an asylum seeker has no access to any other form of accommodation or financial allowance. While these statistics may highlight that expulsion decisions are not made often, the lack of clear and public administrative procedures for withdrawing accommodation, food and the financial allowance, to asylum seekers, is concerning.

2.3 Irish Reception Conditions and EU Law: The Impact of Politics

The core differences between Irish and EU reception at the macro level relates to the refusal of the Irish government to place reception rights on a firm statutory footing. At the micro level, the right to accommodation and financial allowances do not per se clearly violate the core normative obligations under the RRCD 2013. Where there is a clear departure from the provisions of the RRCD 2013 in Ireland, relates to the right to work and the more structured removal of reception rights under the RRCD 2013. In addition, unlike the RRCD 2013, there is no process to identify particularly vulnerable asylum applicants. The Irish government has proffered two core reasons for its failure to opt-in to the RCD 2003 and

⁸⁶ *A.N. v Minister for Justice, Equality and Law Reform*, Outline Submission, paras 2-4.

⁸⁷ *A.N. v Minister for Justice, Equality and Law Reform*, Outline Submission, paras 3-6.

⁸⁸ Counsel for Mr. A.N. relied in particular on the House of Lords judgment in *R (Limbuela) v. Home Secretary of State for the Home Department* [2006] 1 AC 396.

⁸⁹ *A.N. v Minister for Justice, Equality and Law Reform*, Outline Submission, paras 7-8. This point was not developed in the outline submission and it is unclear what procedures were used to remove the applicant from the direct provision system.

⁹⁰ Mary Carolan, 'State undertakes to house destitute asylum seeker', *Irish Times*, Saturday, October 25, 2008 and Mary Carolan, 'Afghan man wins case on housing provision', *Irish Times*, Friday, October 31, 2008.

⁹¹ *McMahon Report*, para.4.142. For discussion of another successful re-admission to direct provision challenge (whereby legal action was threatened, but ultimately not commenced), see Colin Lenihan, 'Expulsion from Direct Provision: The Right to Housing and Basic Subsistence for Asylum Seekers', *Human Rights in Ireland*, 18 June 2014, available at www.humanrights.ie.

RRCD 2013. One, Ireland's Common Travel Area with the United Kingdom,⁹² where there are limited border checks on individuals travelling between both jurisdictions, might impact upon numbers of asylum seekers 'border hopping' between both jurisdictions.⁹³ Second, Ireland argued that while in general it met the norms and standards of both Reception Directives, it did not want to provide asylum applicants with a right to work. This was so as to limit the perceived 'pull factor'.⁹⁴

With Ireland not having legal obligations under the RRCD 2013, it is important to reflect more broadly upon the governance and administration of reception conditions for asylum seekers, the material conditions available to asylum seekers, as well as the role of the Courts in exploring the applicability of EU law to the aforementioned reception conditions. The differing systems of social assistance for those seeking asylum in Ireland came about as a direct result of perceived and manufactured fears for the integrity of the welfare system. Ireland's system for reception conditions is based on non-legislative administrative fiat, with important exclusionary legislative provisions, designed to limit reception rights for asylum seekers domestically. The disciplinary potential of welfare institutions for asylum seekers is more pronounced in comparison to domestic welfare provision. Institutions linked to the justice/immigration functions of government, the Reception and Integration Agency play a major role in meeting the essential living needs of those seeking asylum. The introduction of separated support laws and administrative arrangements occurred at a time that human rights discourse had become more prominent.

Despite the relatively small numbers affected by changes to the system of social assistance in Ireland asylum seekers are an exceptionally vulnerable minority, whose arrival is viewed with deep suspicion by the institutions of government and by the public. Fears of large numbers of asylum and protection seekers in Ireland saw the adoption of penal strategies to limit numbers. The focus on the 'abuse' of the asylum system also resulted in significant changes to the Irish welfare state. Public and political concerns with the growing numbers claiming asylum and/or protection in the late 1990s and early 2000s saw the creation of a separate system of social assistance. Luibhéid argues that the system of direct provision – separated asylum seekers away and apart from host communities – as a

⁹² For a more detailed explanation of the Common Travel Area between Ireland and the United Kingdom, see *Pachero v Minister for Justice and Equality* [2011] IEHC 491, in particular paras 14-21.

⁹³ See, Deputy Andrew Doyle (Fine Gael, government party), *Dáil Debates*, 01 October 2014; (Former) Minister for Justice, Alan Shatter, *Seanad Éireann Debates*, 23 October 2013; Written Answers from Minister for Justice, Equality and Law Reform, Dermot Ahern to Deputy Caoimhghín Ó Caoláin (14 October 2010); Written Answers from (then) Minister for Justice, Equality and Law Reform, Brian Lenihan Jnr to Deputy Joe Costello (31 October 2007).

⁹⁴ *McMahon Report*, para. 3.176, para. 3.180 and para. 5.36.

'... distinct, undesirable type of person who must be subjected to relations of governance that were intended to deter, control, and incapacitate him or her'.⁹⁵

Lentin and Moreo argue that the core purpose of direct provision is to create spaces for enhanced 'deportability'.⁹⁶ This conclusion is bolstered by the creation of a governmental discourses that creates the dichotomy emphasizing the 'wickedness' of the asylum seeker (and their supporters) seeking to take abuse and take advantage of the hospitality of a 'helpless' sovereign state.⁹⁷ The political opportunities to fundamentally reform direct provision, or reintegrate asylum seekers back into the confines of the Irish welfare state, appear to have passed. The *McMahon Report*, whose task was to set out reforms for the system of direct provision, is not being implemented by the Irish Government.⁹⁸ The recent Programme for Government, agreed post the most recent Irish general election, states,⁹⁹

'Long durations in direct provision are acknowledged to have a negative impact on family life. We are therefore committed to reforming the Direct Provision system, with particular focus on families and children.'

There is no mention of the reform proposals contained within the McMahon Report as any form of basis for the reform of direct provision. This was in spite of an earlier leaked draft of the Programme for Government, containing the following commitment,¹⁰⁰

'Long durations in direct provision are acknowledged to have a negative impact on family life. We are therefore committed to reforming the Direct Provision system, with particular focus on families and children *and will seek to implement the recommendations of the McMahon Report as swiftly as possible*.'¹⁰¹

⁹⁵ Eithne Luibhéid, *Pregnant on Arrival: Making the 'Illegal' Immigrant*, Minneapolis: University of Minnesota Press 2013, p. 91.

⁹⁶ Ronit Lentin & Elena Moreo, 'Migrant deportability: Israel and Ireland as case studies', (2015) 38(6) *Ethnic and Racial Studies*, p. 984-910 at p. 897-898.

⁹⁷ See, speech by then Minister for Justice, Alan Shatter responding to a Dáil Éireann debate on rights of asylum seekers (09 October 2013) and comments of the then Department of Justice, Secretary General, Sean Aylward to the UN Committee Against Torture in 2011, accusing lawyers for asylum seekers of operating a 'legal racket' in order to 'to string out the process of these [asylum] applications and it undermined the credibility of the State and its processes'.

⁹⁸ However, see the comments of the (former) Minister for State with responsibility for New Communities, Aodhán Ó Riordáin, Direct Provision: Motion, *Séanad Éireann Debates*, 27 January 2016.

⁹⁹ Office of An Taoiseach (Irish Prime Minister), *A Programme for Partnership Government*, May 2016, p. 103.

¹⁰⁰ The leaked draft of the Programme for Partnership Government is available on www.irishtimes.com.

¹⁰¹ Draft Discussion Document on Partnership for Government, p. 106. My emphasis.

Given the lack of political movement on the system of direct provision, it is no surprise that asylum seekers, with the assistance of public interest lawyers, have attempted to challenge direct provision before the courts. As is explored in more detail throughout Section 3 of this chapter, the Irish courts have had to explore the relationship between EU reception law and the Irish system for reception of asylum seekers. This, as we will see (in particular in Section 3.2 of the Chapter) has not resulted in the improvement of reception rights for asylum seekers in Ireland.

3. JUDICIAL CONSIDERATION OF EU RECEPTION RIGHTS IN IRISH COURTS

With reception rights obligations in Ireland seemingly limited to domestic law solely, there are two broad areas where Irish courts have had to engage in an analysis of the relationship between EU law and Irish law. The first of these areas relates to removal under Dublin II and the 'systemic deficiencies' within Greece that prevented removal of an asylum seeker from Ireland. The second area relates to asylum applicants attempts to utilise the European Union Charter of Fundamental Rights ('the Charter'), coupled with applicable EU asylum and protection instruments, in arguing for a more enhanced reception rights regime in Ireland.

3.1 Removal from Ireland: Domestic Courts Engagement with EU Law

While neither the RCD 2003 nor the RRCD 2013 places legal obligations on Ireland to put in place minimum reception conditions for those seeking asylum, there has been some limited consideration of the RCD 2003 in the Irish High Court. In *Mirza*,¹⁰² the three applicants challenged the refusal of the Office of the Refugee Applications Commissioner (ORAC) to exercise discretion under Article 3(2) of the Dublin II Regulation.¹⁰³ Article 3(2) of the Dublin II Regulation permits an EU Member State to examine a claim for asylum or protection, even if it is the responsibility of another Member State. In *Mirza*, two of the applicants had passed through Greece, were arrested and requested to leave the country and made their way to Ireland to claim asylum. The other applicant's claim for asylum in Greece had failed and she made her way to Ireland to lodge a subsequent claim.¹⁰⁴ Initially, the applicants had argued that ORAC were obliged to consider the likely reception conditions (or lack thereof) that would be available for the applicants.¹⁰⁵ However, this argument was not relied upon at the hearing and the sole issue was the consideration of the procedures for determining refugee

¹⁰² *Mirza v Refugee Applications Commissioner*, Unreported judgment of the High Court, Clarke J., 21 October 2009.

¹⁰³ *Mirza v Refugee Applications Commissioner* at para. 4.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Mirza v Refugee Applications Commissioner* at para. 5(f)(i).

status within Greece.¹⁰⁶ The applicants therefore did not challenge ORAC's determination that there was no risk of ill-treatment in Greece.¹⁰⁷ Nevertheless, Ms Justice Clark did make reference to the protection of the applicants' rights under the RCD 2003 in Greece throughout her judgment. Clarke J. held that as a Member State of the EU and contracting party to the ECHR, there was a presumption that Greece would comply with its obligations.¹⁰⁸ Clarke J. accepted that a transfer to Greece would not be permitted to take place where the transferred asylum applicant faced 'a real risk of being subjected to treatment contrary to Article 3'.¹⁰⁹ However, the claims made by the applicants related to Greece's non-conformity with aspects of the Common European Asylum System (CEAS). If a Member State is not complying with its obligations under EU law, Clark J. stated that it is for the EU Commission and not another Member State to take steps to put the situation right.¹¹⁰ While Clark J. accepted that the living conditions for those seeking asylum or protection in Greece are 'inadequate and sometimes appalling', this did not reach the level of severity required to breach Article 3 ECHR.¹¹¹

Issues relating to Greek returns continued to come before Irish courts. Clarke J. permitted the applicants an appeal to the Irish Supreme Court in *Mirza* and Ireland suspended all transfers to Greece.¹¹² In October 2010, there were at least 32 cases pending before the Irish High Court on issues relating to Greece and CEAS.¹¹³ In *M.E. v Refugee Applications Commissioner*, the five applicants argued that the procedures and reception conditions in Greece were so inadequate that Ireland was obliged to exercise its discretion under Article 3 (2) of the Dublin II Regulation to accept responsibility for examining these asylum claims.¹¹⁴ No argument was put forward in relation to Article 3 ECHR. The applicants claimed that a return to Greece would violate Article 18 of the Charter (right to claim asylum) and given that the Charter had the same legal status as the EU Treaties, the discretion under Article 3(2) of the Dublin II Regulation, had to be interpreted in accordance with Article 18 of the Charter.¹¹⁵ In agreeing to make a preliminary reference, Clark J. noted that there was diverging case law emerging on the legal effect of the Charter on the CEAS.¹¹⁶ Clark J. noted that she had already decided

¹⁰⁶ *Mirza v Refugee Applications Commissioner* at para. 19.

¹⁰⁷ *Mirza v Refugee Applications Commissioner* at para. 47.

¹⁰⁸ *Mirza v Refugee Applications Commissioner* at para. 64.

¹⁰⁹ *Mirza v Refugee Applications Commissioner* at para. 84.

¹¹⁰ *Mirza v Refugee Applications Commissioner* at paras 86-90.

¹¹¹ *Mirza v Refugee Applications Commissioner* at para 97.

¹¹² *M.E. and others v Refugee Applications Commissioner*, Unreported judgment of the High Court (Clark J., 11 October 2010), para. 14.

¹¹³ *M.E. and others v Refugee Applications Commissioner*, Unreported judgment of the High Court (Clark J., 11 October 2010), para. 1.

¹¹⁴ *M.E. and others v Refugee Applications Commissioner*, para. 3.

¹¹⁵ *M.E. and others v Refugee Applications Commissioner*, para. 15.

¹¹⁶ *M.E. and others v Refugee Applications Commissioner*, para. 16. See *R (Saaedi) v Secretary of State for the Home Department, ex parte Aire Centre, Amnesty International and UNHCR*

in *Mirza* that it would be contrary to the spirit and intention of the Dublin II Regulation if ORAC or domestic courts had to examine the effectiveness of asylum systems in other Member States.¹¹⁷ However, with the Charter now having legal effect post the implementation of the Lisbon Treaty, Clark J. stated that she would welcome guidance on the transfer of claimants to Member States where there is evidence of unfavourable reception conditions and/or ineffective asylum procedures.¹¹⁸ Two questions were referred to the CJEU. Firstly, presuming no Article 3 ECHR issues arose, whether the transferring Member State under the Dublin II Regulation must assess the compliance of the receiving Member State with Article 18 of the Charter and the Procedures Directive, Qualification Directive and the RCD 2003. If the answer to this is yes and if the receiving Member State is found not to comply with the asylum and protection directives, then is a transferring Member State obliged to accept responsibility for examining an asylum/protection obligation under Article 3(2) of the Dublin II Regulation.¹¹⁹ The Court of Appeal in England and Wales had also made a preliminary reference to the CJEU on similar issues. On 09 October 2010, both of these preliminary references were joined.¹²⁰ Given the decision of the ECtHR in *M.S.S. v Belgium and Greece*,¹²¹ the decision of the CJEU was in some ways a foregone conclusion. The approach of the CJEU towards substantive socio-economic rights of asylum seekers, shows the court is willing to conform its findings and jurisprudence to that of the European Court of Human Rights i.e. willing to prevent removal to another EU Member State who will not meet the minimum standards as set down in the RCD 2003.¹²²

Arguments that other EU Member States (other than Greece) do not offer a sufficient level of reception rights protection have generally been rejected.¹²³ In *J.M.O. v Refugee Applications Commissioner*, McDermott J. rejected the argument that Slovakia's reception conditions reached the level of severity to constitute an Article 4 of the Charter (Article 3 ECHR) breach that prevented re-

[2010] EWHC 705 (Admin) (31 March 2010) and *Transfer of Asylum Applicants to Greece*, German Administrative Court, Frankfurt, BeckRS 2009 36287 (8 July 2009).

¹¹⁷ *M.E and others v Refugee Applications Commissioner*, para. 25.

¹¹⁸ *M.E and others v Refugee Applications Commissioner*, para. 29.

¹¹⁹ *M.E and others v Refugee Applications Commissioner*, para. 30 and Case C-493/10, *M.E. and Others v Refugee Applications Commissioner and others* [2011] Official Journal C.13/18 (15 January 2011).

¹²⁰ European Agency for Fundamental Rights (FRA), *Coping with a Fundamental Rights Emergency: The Situation of Persons Crossing the Greek Border in an Irregular Manner*, Vienna: FRA 2011, p. 5.

¹²¹ *M.S.S. v. Belgium and Greece* (App 30696) (Grand Chamber, judgment, 21 January 2011).

¹²² See, Joined cases C-411/10 and C-493/10, *N.S. v Secretary of State for the Home Department, M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [2012] 2 *Common Market Law Reports* 9. For Ireland, see more recently, *F.O. v Refugee Appeals Tribunal* [2014] IEHC 123.

¹²³ See, *J.G. v Refugee Applications Commissioner* [2013] IEHC 248; *Minister for Justice and Equality v Strzelecki* (No. 2) [2013] IEHC 477; *Minister for Justice and Equality v Eglitis* [2013] IEHC 215 and *Minister for Justice, Equality and Law Reform v Marjasz* [2012] IEHC 233.

moval.¹²⁴ In summation, the Irish superior courts have accepted that where an asylum seeker is to be transferred under the Dublin Regulation, this transfer can only be prevented where the applicant shows a 'real risk' of an Article 4 of the Charter/Article 3 ECHR violation if so transferred.¹²⁵ The burden of proof for this rests with the applicant.¹²⁶ Therefore, despite the RCD 2003 and the RRCD 2013 not applying within Ireland, the Irish judiciary are somewhat familiar with the core provisions, given the number of decisions on transfers under the Dublin system.

3.2 Utilising the Charter for Indirect Compliance with EU Reception Rights?

The modalities of Irish reception conditions described above in Section 2 of this chapter emphasise the degree to which asylum seekers enjoy limited legal/legislative rights to reception conditions. Instead, governmental and administrative fiat are the hallmark of Irish reception conditions. The system of direct provision and its relationship with rights under the Charter was first considered, not in the Irish courts, but within the Northern Ireland High Court. (For readers unfamiliar with Irish history, it is important to note that Northern Ireland has its own legal system, and is part of the United Kingdom). The Republic of Ireland's system of direct provision was considered in the Northern Ireland High Court in *Judicial Review by ALJ and Others*.¹²⁷ The applicants' claims for refugee status in Ireland on the basis of persecution of non-Sudanese Darfuris in Sudan had been rejected. The applicants subsequently sought subsidiary protection in Ireland in April 2011. However, in July 2011, the applicants entered Northern Ireland and applied for asylum. The UK Border Agency sought to return the applicants to the Republic of Ireland under the Dublin II Regulation.¹²⁸ This decision was challenged *inter alia* on the basis that a return to the Republic of Ireland and to the system of direct provision, would subject the applicants to inhuman and degrading treatment and violate their rights to private and family life as protected by the European Charter of Fundamental Rights (EUCFR). Although not 'systemati-

¹²⁴ [2014] IEHC 467, in particular para. 68.

¹²⁵ *JMO v Refugee Applications Commissioner & Ors* [2014] IEHC 467, citing with approval the ECtHR decision in *M.S.S. v. Belgium and Greece* (App 30696) (Grand Chamber, judgment, 21 January 2011). See also, Joined Cases C-411/10 and C-493/10 *N.S./M.E.* [2011] ECR I-865.

¹²⁶ *JMO v Refugee Applications Commissioner & Ors* [2014] IEHC 467, para. 75. See also, *Wadria v Minister for Justice* [2011] 3 IR 53.

¹²⁷ *In the Matter of an Application for Judicial Review by ALJ and A, B and C* [2013] NIQB 88 (Stephens J, 14 August 2013). Other issues relating to the fairness and appropriateness of the status determination system for those seeking asylum and/or subsidiary protection in Ireland, will not be discussed, see paras. 53-70 of the decision.

¹²⁸ Council Regulation (EC) No 407/2002 of 28 February 2002 laying down certain rules to implement Regulation (EC) No 2725/2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention [2003] O.J. L.62/1.

cally deficient', Stephens J. stated that Ireland's low rate of recognition of protection seekers was 'disturbing'.¹²⁹ Mr Justice Stephens relying extensively on the Irish Refugee Council's report *State Sanctioned Child Poverty and Exclusion* accepted the significant hardships asylum seekers in Ireland face. These hardships included: inability for the adult applicants to seek or enter employment; the low rate of direct provision allowance; the communal nature of accommodation and the hostile environment towards family life.¹³⁰ Ultimately, Stephens J. was not prepared to find that this constituted a violation of the Charter.¹³¹ However, the UK Border Agency, were statutorily obliged to 'promote the welfare of children who are in the United Kingdom'.¹³² Due to the communal nature of direct provision accommodation centres, the inability of ALJ and Child A (who was over 18) to enter employment in Ireland and the significant physical and mental health issues impacting on asylum seekers due to the direct provision system, Stephens J. refused to permit the UK Border Agency to return the applicants to the Republic of Ireland on the basis that it would be contrary to the best interests of the migrant children in the family.¹³³

As the decision in *ALJ* was firmly grounded in interpretation of (UK) domestic legal obligations as regards the best interests of the migrant child, reading this decision as being transformative would be unwise. Only if the decision in *ALJ* had been firmly based on an interpretation of the Charter, would this decision have had a more profound impact. Not before long, decisions challenging the system of direct provision and the lack of a right to work for asylum seekers came before the Irish courts. In both decisions to date, counsel for the asylum applicants sought to utilise the Charter as a basis for the recognition of enhanced reception rights for asylum seekers. In *C.A. v Minister for Justice and Equality*¹³⁴ the High Court held that the Charter was of no application to a claim that the State's di-

¹²⁹ *In the Matter of an Application for Judicial Review by ALJ and A, B and C* [2013] NIQB 88, para. 65.

¹³⁰ *In the Matter of an Application for Judicial Review by ALJ and A, B and C* [2013] NIQB 88, paras. 71-90.

¹³¹ *In the Matter of an Application for Judicial Review by ALJ and A, B and C* [2013] NIQB 88, para. 84.

¹³² Section 55, Borders, Immigration and Citizenship Act 2009 and the UK Supreme Court's interpretation of this duty in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] 2 AC 166.

¹³³ At paragraph 73, Mr Justice Stephen's stated, '[a]sylum seekers are legally required to "reside and remain" in the Direct Provision accommodation centre ... It is a criminal offence to breach this requirement.' This is not the case and asylum seekers are free to leave direct provision, once they inform the Office of Refugee Applications Commissioner of their new address. However, if they do leave, they are not entitled to the payment of € 19.10 per week per adult/€ 15.60 per week per child. Further on in paragraph 102 (and again in para 73 & 75), Mr Justice Stephen's states: '[c]hildren of asylum seekers are not entitled to a state education once they are 16'. This too is incorrect and children of asylum seekers or child asylum seekers are entitled to remain in secondary education until completion of their terminal secondary school examination.

¹³⁴ *C.A. & others v Minister for Justice and Equality* [2014] IEHC 532

rect provision system for subsidiary protection applicants breached fundamental rights, including Charter rights.¹³⁵ The applicants in this case, a mother and child, had been within the direct provision system for several years. While some aspects of the direct provision system were deemed to violate constitutional rights,¹³⁶ EU law was not deemed to apply, pursuant to Protocol No 21 to the TFEU, an opt out of measures in the field of freedom, security and justice. While Ireland had chosen to opt in to certain measures in asylum law, including the Qualification Directive and the Procedures Directive, it had not opted in to the Reception Conditions Directive. Mr. Justice Mac Eochaidh concluded that by virtue of Protocol 21, issues relating to the reception conditions of asylum seekers were inherently outside the realm of an EU obligation, so that there was no means to give the Charter any sort of domestic effect on this issue.¹³⁷ As Kingston and I have noted on this finding,

'... while the right to subsidiary protection is undoubtedly derived from EU law, the fact of opt-out from a piece of secondary legislation (the Reception Conditions Directive) means nevertheless that the EU's fundamental rights regime does not apply to applicants for grant of subsidiary protection status. As this raises difficult issues of EU constitutional law, one might have thought that it merited a reference to the CJEU.'¹³⁸

However, this finding has been followed in subsequent Irish case law. In *N.H.V. & F.T v Minister for Justice and Equality*,¹³⁹ both applicants were present in Ireland for over 8 years as asylum seekers, seeking protection.¹⁴⁰ Section 9 of the Refugee Act 1996 (as amended) prohibits asylum seekers from seeking or entering employment, including self-employment. Mr. Justice McDermott rejected the applicants' contention that they had a constitutional right to work,¹⁴¹ and even if they did,

¹³⁵ For a summary of this challenge, see, Liam Thornton, 'C.A & T.A.: The Direct Provision Case', (2014) 4 *Irish Journal of Family Law*, p. 116-118.

¹³⁶ For a fuller discussion on these domestic aspects of the case, see: Liam Thornton, 'C.A & T.A.: The Direct Provision Case', (2014) 4 *Irish Journal of Family Law*, p. 116-118 and Liam Thornton, 'Socio-Economic Rights and Ireland', in: Suzanne Egan (ed.), *International Human Rights: Perspectives from Ireland*, Bloomsbury 2015, p.171-198, in particular p. 195-198.

¹³⁷ *Ibid.* at paras. 11.8-11.9.

¹³⁸ Suzanne Kingston & Liam Thornton, *A Report on the Application of the European Convention on Human Rights Act 2003 and the European Union Charter of Fundamental Rights: Evaluation and Review*, Law Society 2015, p. 1-158 at p. 119. References omitted. It should be noted that neither the applicants nor respondents requested a reference to the CJEU.

¹³⁹ *N.H.V. & F.T v Minister for Justice and Equality* [2015] IEHC 246.

¹⁴⁰ For a glossary of terms of regards phrases such as 'asylum seeker', 'protection seeker', 'refugee' and 'subsidiary protection' in Ireland, see, L. Thornton, *Glossary of Terms: Irish Asylum Law*, Office of the Houses of the Oireachtas 2013.

¹⁴¹ The applicants arguments under the ECHR Act 2003, and Article 8 ECHR in particular, as well as under the European Union Charter of Fundamental Rights, were also rejected, see:

'the scope and exercise of such rights may be defined and regulated pursuant to the very wide power which the State has to control aliens and their entry into the State and activities whilst present'.¹⁴²

Turning to the Charter argument, relying on the reasoning employed in case-law in England and Wales,¹⁴³ McDermott noted that Article 15 (3) of the Charter clearly excludes the right to work for third country nationals who have not been granted a right to work within a Member State. McDermott J. further found that given that Ireland did not opt into the Reception Directives (2003 or 2013), EU law on the issue did not impact on Ireland's prohibition of the right to work.¹⁴⁴ The Charter distilled no rights for protection applicants in Ireland. This conclusion was accepted by the Irish Court of Appeal in March 2016.¹⁴⁵ Mr. Justice Hogan (although dissenting on the constitutional issue), concluded that,

'... it must be accepted that the topics which were the subject matter of the Directive itself remained entirely within the sovereign realm of this State and, accordingly, fell outside the scope of EU law. As the right of asylum seekers to participate in the labour market pending the determination of their claim is one of these very topics which were addressed by the 2013 Reception Directive, legislation enacted by the Oireachtas regulating the rights of asylum seekers in relation to employment and the labour market equally falls outside the scope of EU law. One may thus say that by electing to opt-out of the Directive (and, in that sense, not to implement the Directive), the State could hardly be said to be implementing Union law.'¹⁴⁶

Therefore, while the Irish courts will consider whether an EU Member State is complying with their obligations under the RCD 2003 or RRCD 2013 as regards transfer of an asylum seeker under the Dublin system, this will not be extended to providing an interpretation of the Charter that encompasses reception rights for asylum seekers who are actually present in Ireland.

N.H.V. & F.T v Minister for Justice and Equality [2015] IEHC 246, paras. 36-46 and paras. 47-62.

¹⁴² *N.H.V. & F.T v Minister for Justice and Equality* [2015] IEHC 246, para. 32.

¹⁴³ *Rostami v Secretary of State for the Home Department* [2013] EWHC 1494.

¹⁴⁴ *N.H.V. & F.T v Minister for Justice and Equality* [2015] IEHC 246, para. 46.

¹⁴⁵ *N.H.V. v Minister for Justice and Equality* [2016] IECA 86. It should be noted that in this decision, two judges found that the applicant had no entitlement to work either under EU law, ECHR law or domestic law. One judge would have found that the absolute prohibition on an applicant for asylum not been permitted to work was unconstitutional. Given the EU focus of the chapter, I am restricting my analysis to the EU elements of the decision.

¹⁴⁶ *N.H.V. v Minister for Justice and Equality* [2016] IECA 86 at para. 44, per Hogan J. The case is currently under appeal to the Irish Supreme Court. It remains to be seen whether the Supreme Court will engage with EU legal argument, see *N.H.V. v Minister for Justice and Equality* [2016] IESCDT 51, in particular para. 16.

4. CONCLUSIONS

Ireland's approach to reception conditions and rights for asylum seekers has not been overly influenced or impacted by the convergence of European Union law under the RCD 2003 and RRCD 2013, or by a more rights based interpretation of the Charter. This stands in contrast to Ireland's opt outs of the Recast Qualification and Procedures Directives, which are generally softly opted into within the new International Protection Act 2015. While the non-return of asylum seekers within Ireland to Greece has been prohibited by the Irish courts (but only after confirmation by the Court of Justice of the European Union), the Charter has failed to pierce the sovereign veil of Irish asylum reception law and policy. The *McMahon Report* has recommended that Ireland opt-into all the Recast Asylum Directives, including the Recast Reception Directive, 'unless clear and objectively justifiable reasons can be advanced not to'.¹⁴⁷ It is, in my view, unlikely that the Irish Government will want to limit its administrative discretion or impose upon the State obligations surrounding reception conditions for asylum seekers. It took fifteen years for the existence of direct provision to become a matter of governmental and public concern. The publication of the *McMahon Report*, which contains significant recommendations on reform of reception conditions for asylum seekers in Ireland,¹⁴⁸ did not offer an opportunity for the government and wider society to reflect on 'the rights of others'. For now, the *McMahon Report* appears to have been simply a way to deal with political and public concern surrounding reception rights and systems for asylum seekers in Ireland. Overall, the EU reception *acquis* has not impacted upon the reception rights of asylum seekers in Ireland.

¹⁴⁷ *McMahon Report*, para.3.178.

¹⁴⁸ Although I do have significant concerns with many of these recommendations from a human rights perspective, see further Liam Thornton, *A Preliminary Human Rights Analysis of the Working Group Report and Recommendations on Direct Provision*, UCD Centre for Human Rights Working Paper, 30 June 2015, available at: <http://ssrn.com/abstract=2685268>.

PART 2:THE IMPLEMENTATION OF THE DIRECTIVE IN SELECTED MEMBER STATES

5. La Transposition de la Directive 'Accueil' en France

Caroline Lantero

La présentation de la transposition de la refonte de la directive en France appelle quatre séries de remarques. En premier lieu, un rappel de ce que la France n'avait pas transposé de manière aboutie et totalement conforme la première directive de 2003, ce qui lui a valu à plusieurs reprises les foudres de la Cour de Justice de l'Union Européenne (CJUE). En deuxième lieu, le constat de ce que la transposition de la refonte a formellement eu lieu en juillet 2015 et qu'elle a considérablement amélioré les conditions d'accueil des demandeurs d'asile. En troisième lieu, une remarque sur le fait que la transposition de certaines dispositions demeure discutable et à tout le moins, particulièrement libre dans l'interprétation, par la France, de la directive. En quatrième et dernier lieu, une remarque sur le décalage observé entre les engagements de l'Etat et la situation concrète, à travers l'illustration de la situation des migrants à Calais, qui démontre à quel point le chemin est encore long pour offrir des conditions d'accueil dignes et décentes.

1. LA FRANCE, LA DIRECTIVE DE 2003 ET LA CJUE: QUELQUES RAPPELS

La France n'avait déjà que partiellement transposé la directive du 27 janvier 2003.¹ La Commission avait d'ailleurs adressé une mise en demeure à la France le 22 mars 2005 et la transposition fut (presque) achevée par un décret d'août 2005.²

La France n'en avait fait ensuite qu'une application a minima, pour ne pas dire erronée, ce qui lui avait déjà valu des rappels fermes de la Cour de Justice de l'Union Européenne (CJUE) dans un arrêt du 27 septembre 2012³ lui indiquant que des conditions matérielles dignes devaient être octroyées au bénéfice de *tous* les demandeurs d'asile (y compris ceux faisant l'objet d'une procédure 'Dublin'), dès le dépôt de leur demande d'asile et jusqu'à ce que soit rendue une décision définitive sur leur demande (ou jusqu'au transfert effectif du demandeur vers un autre Etat membre en application du règlement Dublin II).

¹ Loi n° 2003-1176 du 10 décembre 2003 modifiant la loi n° 52-893 du 25 juillet 1952 relative au droit d'asile et par le décret n° 2004-813 du 14 août 2004 modifiant le décret n° 46-1574 du 30 juin 1946 réglementant les conditions d'entrée et de séjour en France des Etrangers.

² Décret n° 2005-1051 du 23 août 2005 modifiant le décret n° 46-1574 du 30 juin 1946 réglementant les conditions d'entrée et de séjour en France des étrangers.

³ CJUE, 4^e chambre, 27 septembre 2012, La Cimade & Gisti, C-179/11 Marie-Laure Basilien-Gainche, 'Obligations d'octroi des conditions minimales d'accueil aux demandeurs d'asile "dublinés"', *Lettre Actualités Droits-Libertés* du CREDOF, 2 octobre 2012.

Dans sa législation alors en vigueur, la France n'offrait pas les conditions matérielles d'accueil prescrites par la Directive de 2003 aux demandeurs susceptibles d'être 'dublinés'. Privés d'admission au séjour au titre de l'asile, ils ne pouvaient ni bénéficier d'un hébergement (accueil dans un Centre d'Accueil des Demandeurs d'Asile ou hébergement d'urgence), ni bénéficier de l'allocation temporaire d'attente (ATA).

La législation française distinguant des demandeurs d'asile admis au séjour et des demandeurs d'asile non admis au séjour n'était donc déjà pas conforme au droit de l'Union Européenne qui n'établit ni n'admet une telle différence. Cette législation n'a pas été modifiée dans les suites de l'arrêt de la CJUE, mais la Haute Juridiction Administrative française a toutefois admis que les 'dublinés' devaient bénéficier de conditions d'accueil conforme à la Directive de 2003.⁴

Dans un arrêt du 27 février 2014,⁵ la CJUE a précisé ce qu'impliquait concrètement la mise en œuvre de conditions matérielles d'accueil dignes, notamment au regard de la prise en compte de la vulnérabilité de certains demandeurs d'asile, qui devait être dûment faite, sans conduire à l'exclusion des 'moins' vulnérables. La Cour insistait notamment sur les termes de l'article 7 de la Directive: 'le montant de l'aide financière octroyée doit être suffisant pour garantir un niveau de vie adéquat pour la santé et assurer la subsistance des demandeurs d'asile' (points 37 & 48 notamment), en prenant en considération d'une part *leurs besoins généraux en termes de logement, de nourriture, d'habillement* (point 38), et d'autre part leurs besoins particuliers découlant de la prise en compte d'un état de vulnérabilité ou comme en l'espèce de la préservation de l'unité familiale (points 41 & 45).

En miroir de cette décision, la politique, comme la législation, comme la jurisprudence françaises sont apparues – à l'évidence – non conformes à la Directive: sous-dimensionnement du dispositif national d'accueil,⁶ non transposition (ou mépris des prescriptions) de la Directive sur la situation des personnes particulièrement vulnérables,⁷ décisions de justice validant l'exclusion des non vulnérables.⁸

Le contexte dans lequel la France était amenée à transposer la directive de 2013 n'était donc pas celui d'une transposition aboutie des normes *minimales*

⁴ Pour l'ATA: CE 17 avril 2013, La Cimade & Gisti, n°335924.

⁵ CJUE, quatrième chambre, 27 février 2014, *Federaal agentschap voor de opvang van asielzoekers contre Selver Saciri, Danijela Dordevic, Danjel Saciri, Sanela Saciri, Denis Saciri, Openbaar Centrum voor Maatschappelijk Welzijn van Diest*, affaire C-79/13.

⁶ G. Sadik, 'Accueil des demandeurs d'asile: cartographie d'une crise', *Xénodoques*, 21 août 2013.

⁷ Marie-Laure Basilien-Gainche & Serge Slama, 'Implications concrètes du droit des demandeurs d'asile aux conditions matérielles d'accueil dignes', *La Revue des droits de l'homme* [En ligne], Actualités Droits-Libertés, mis en ligne le 05 mars 2014, consulté le 28 novembre 2015. URL: <http://revdh.revues.org/607>.

⁸ C. Pouly & S. Slama, 'Des demandeurs d'asile sous tente en plein hiver: la protection de l'effectivité du droit d'asile par le juge administratif ne va pas toujours de soi', D. (tribune) 2010, 2918.

d'accueil prescrites par le droit de l'Union Européenne, et pouvait laisser craindre une transposition réticente des normes *harmonisées*.

2. LA TRANSPOSITION: DES CONDITIONS D'ACCUEIL AMELIOREES MAIS PLUS DIRECTIVES

La transposition qui devait intervenir au plus tard le 20 juillet 2015, a été tardive, mais moins que d'habitude.

La loi n° 2015-925 du 29 juillet 2015, relative à la réforme du droit d'asile, a été annoncée comme une réforme 'en profondeur' du système d'asile français. Il s'agit pourtant, d'abord et avant tout, d'une loi de transposition, des Directives 'Qualification', 'Accueil' et 'Procédures'. Certaines dispositions sont entrées en vigueur avec effet rétroactif pour les demandes enregistrées à compter du 20 juillet 2015 (date limite de transposition de certaines dispositions des Directives⁹). D'autres sont entrées en vigueur le 31 juillet 2015 (au lendemain de la publication de la loi), d'autres enfin, les plus nombreuses, sont entrées en vigueur le 1er novembre 2015, avec le décret n°2015-1166 du 21 septembre 2015, ainsi que le décret n°2015-1364 du 28 octobre 2015.

On relève, pour l'argument, que la Commission a mis en demeure la France, fin septembre 2015 pour n'avoir pas communiqué les mesures de transposition. Cette mise en demeure a toutefois été adressée à 19 Etats membres dans le contexte de la crise aigüe des réfugiés que connaissait l'Union Européenne en septembre 2015¹⁰, la commission invitant à une '*gestion plus responsable de cette crise*'.

2.1 Des Conditions d'Accueil Améliorées grâce à la Transposition de la Directive... 'Procédures'

Reprenons la loi de transposition, en faisant un détour par la transposition de la Directive Procédures, qui a un impact fondamental sur les conditions d'accueil des demandeurs d'asile. Pour se mettre en conformité avec la Directive 'Procédures', la loi française a enfin abandonné toute distinction entre demandeurs admis au séjour et demandeurs non admis au séjour. Jusqu'alors, les premiers pouvaient séjourner librement et déposer leur demande d'asile devant l'OFPRA selon la procédure de droit commun. Les seconds étaient placés en procédure alors improprement qualifiée de 'prioritaire', avec des conditions d'accueil limitées (aide médicale, allocation temporaire d'attente). Il existe désormais une procédure d'enregistrement et non plus d'admission, suivie d'un examen 'Dublin', et la consécration d'un droit au *maintien* (qui, attention, n'est pas un droit au *séjour*) sur le territoire le temps de l'examen de la demande d'asile.

⁹ Une circulaire a été publiée afin de donner les instructions utiles à la période transitoire (circ. min., NOR: INTK1 517 035J du 13 juillet 2015, mise en œuvre de la réforme de l'asile.

¹⁰ Communiqué de presse du 23 septembre 2015, url: http://europa.eu/rapid/press-release_IP-15-5699_fr.htm#_ftn3.

En effet, aux termes de la nouvelle rédaction de l'article L. 741-1, applicable depuis le 31 juillet 2015, et sauf pour les demandes d'asile à la frontière ou en rétention, le préfet enregistre la demande d'asile (au plus tard trois jours après la demande, dix jours maximum en cas de nombreuses demandes simultanées) et délivre une attestation de demande d'asile (selon des modalités et pour une durée de validité à définir par le pouvoir réglementaire), y compris au demandeur susceptible d'être 'dubliné', ce qui est alors dûment précisé sur l'attestation. Le préfet doit donc seulement pouvoir identifier la personne concernée, l'exigence d'une domiciliation ayant, par ailleurs, disparu.

Parallèlement, aux termes d'un nouveau chapitre du Code de l'entrée et du séjour des étrangers et du droit d'asile 'Droit au maintien sur le territoire français' (articles L. 743-1 suivants), le demandeur d'asile a le 'droit de se maintenir sur le territoire français jusqu'à la notification de la décision de l'office ou, si un recours a été formé, jusqu'à la notification de la décision de la Cour nationale du droit d'asile'.

Ainsi, il y a désormais beaucoup moins d'aléa dans les conditions d'accueil en France, non pas grâce à la transposition de la Directive 'Accueil', mais grâce à la transposition de la Directive 'Procédures'.

2.2 L'Examen de Vulnérabilité

Un nouveau chapitre du code de l'entrée et du séjour des étrangers et du droit d'asile (CESEDA) est consacré aux '*conditions d'accueil des demandeurs d'asile*' et donne un rôle central à l'Office français de l'immigration et de l'intégration (OFII), chargé de centraliser l'organisation, la gestion et le contrôle du dispositif national d'accueil.

La mise en place d'un *guichet unique* à la préfecture, où sera présent un représentant de l'OFII est l'une des grandes nouveautés de la loi mais a soulevé inévitablement quelques inquiétudes quant à l'importance du rôle de cet Office, qui est un établissement public sous tutelle du ministère de l'Intérieur, notamment en ce qu'il doit évaluer la **vulnérabilité** des demandeurs.

Dès que la demande d'asile est enregistrée, l'OFII doit proposer les prestations d'accueil et les allocations prévues par la Directive 'Accueil', à savoir logement, nourriture, habillement et allocation de subsistance. L'OFII doit procéder à un entretien personnel à des fins d'*évaluation des besoins*' du demandeur d'asile et en tenant particulièrement compte de la situation spécifique des personnes vulnérables (mineurs, mineurs non accompagnés, personnes en situation de handicap, personnes âgées, femmes enceintes, parents isolés accompagnés d'enfants mineurs, victimes de la traite des êtres humains, personnes atteintes de maladies graves, personnes souffrant de troubles mentaux et personnes qui ont subi des tortures, des viols ou d'autres formes graves de violence psychologique, physique ou sexuelle, telles que des mutilations sexuelles féminines), comme l'indique l'article L. 744-6. Ces dispositions étaient applicables pour les demandes enregistrées à compter du 20 juillet 2015.

La loi précise que cet examen de vulnérabilité ne préjuge en rien de l'appréciation que fera l'OFPRA qui, lui-même, conduira un tel examen. Un

double scrutin de la vulnérabilité est donc mis en place, ce qui peut faire craindre un effet pervers s'agissant du traitement de ceux qui n'auront pas été considérés comme vulnérables. Au-delà du problème de compétences sanitaires et sociales des agents de l'OFII (bien que la loi prévoit qu'ils reçoivent une '*formation spécifique*'), certains redoutent un effet de tri. Un arrêté du 23 octobre 2015 relatif au questionnaire de détection des vulnérabilités indique toutefois que l'examen n'est pas aussi poussé et ne nécessite pas autant de compétences que prévu.¹¹

2.3 L'Hébergement

Il est important de relever que le bénéfice d'un hébergement et d'une allocation sont ouverts à **tous les demandeurs d'asile**, qu'ils relèvent de la procédure de droit commun, de la procédure accélérée, ou de la mise en œuvre du Règlement 'Dublin'... à condition d'en accepter les conditions.

Les conditions et la durée d'hébergement sont prévues dans les dispositions des articles L. 744-1 et suivants du Code de l'entrée et du séjour des étrangers et du droit d'asile.

Les nouvelles dispositions impliquent nécessairement d'augmenter les capacités d'accueil, ce qui est conforme aux garanties exigées par la Directive 'Accueil'. Mais l'hébergement devient également ouvertement très **directif**, pour ne pas dire **contraignant**. Il est évident qu'il a aussi vocation à garder sous contrôle (de l'OFII) la situation géographique des demandeurs de protection.

Dans le cadre d'un *schéma national d'accueil des demandeurs d'asile*, arrêté par le ministre de l'Intérieur, et de *schémas régionaux* établis par les préfets,¹² l'OFII prend toutes les décisions d'admission (mais aussi les décisions de sortie et de changement de lieu) dans un lieu d'hébergement pour demandeurs d'asile.¹³ Il coordonne toutes les admissions au moyen d'un traitement automatisé de celles-ci, pour tous les lieux d'hébergement (CADA ou autres),¹⁴ étant précisé que l'admission doit être acceptée par le demandeur d'asile après qu'il a été informé des conséquences de l'acceptation ou du refus de l'hébergement proposé. En cas de refus,¹⁵ le demandeur ne peut se prévaloir du droit à un logement opposable prévu par les dispositions du Code de la construction et de l'habitation,¹⁶ ni bénéficier de l'allocation de subsistance.

¹¹ Arrêté du 23 octobre 2015 relatif au questionnaire de détection des vulnérabilités des demandeurs d'asile prévu à l'article L. 744-6 du code de l'entrée et du séjour des étrangers et du droit d'asile, JORF n°0253 du 31 octobre 2015 page 20403.

¹² Art. L. 744-2 du CESEDA.

¹³ Art. L. 744-3 du CESEDA.

¹⁴ Art. L. 744-4 du CESEDA.

¹⁵ Art. L. 744-7 du CESEDA.

¹⁶ Art. L. 300-1 du code de la construction et de l'habitation: 'Le droit à un logement décent et indépendant, mentionné à l'article 1er de la loi n° 90-449 du 31 mai 1990 visant à la mise en œuvre du droit au logement, est garanti par l'Etat à toute personne qui, résidant sur le territoire français de façon régulière et dans des conditions de permanence définies par décret en Conseil d'Etat, n'est pas en mesure d'y accéder par ses propres moyens ou de s'y maintenir.'

Aux termes des dispositions de l'article L. 744-8 du CESEDA, l'hébergement peut être refusé dans le cadre d'une demande de réexamen ou si la personne n'a pas sollicité l'asile dans un délai de 120 jours après être entrée et s'être maintenue en France irrégulièrement. L'hébergement peut également être suspendu si le demandeur d'asile l'abandonne ou ne respecte pas ses obligations dans le cadre de l'instruction de la demande d'asile. Enfin, l'hébergement peut être retiré en cas d'informations mensongères du demandeur d'asile sur sa situation financière ou sur sa situation familiale (ces raisons ne sont pas prévues dans la Directive 'Accueil'), et en cas de '*comportement violent*' ou de '*manquements graves au règlement du lieu d'hébergement*'.

La décision de refus, de suspension ou de retrait doit être écrite, motivée et prise après que le demandeur a été mis en mesure de présenter ses observations écrites.

En dehors de ces situations, l'hébergement prend normalement fin avec la décision définitive sur la demande de protection (admission ou rejet), ou avec le transfert *effectif* de la personne vers l'Etat responsable de la demande d'asile, mais il pourra être prolongé '*à titre exceptionnel et temporaire*' dans des conditions fixées par l'article R. 744-12 du décret n°2015-1166 du 21 septembre 2015.

Si la personne doit quitter le lieu d'hébergement et qu'elle ne le fait pas malgré une mise en demeure, elle sera regardée comme un occupant sans titre et l'autorité administrative pourra solliciter le juge des référés '*mesures utiles*'.¹⁷

2.4 L'Allocation pour Demandeurs d'Asile

Prévue à l'article L. 744-9 du CESEDA, l'allocation pour demandeur d'asile (ADA), versée par l'OFII, remplace l'allocation temporaire d'attente (ATA), versée par Pôle Emploi.¹⁸

Conditionnée à l'acceptation des conditions matérielles d'accueil proposées, l'ADA est ouverte à tous jusqu'à la décision définitive sur la demande d'asile ou jusqu'au transfert effectif du demandeur vers un autre Etat membre en application du Règlement 'Dublin'.

Cette allocation sera évaluée en fonction des ressources, de l'âge du demandeur et de son mode d'hébergement. Son montant et le barème d'évaluation sont fixés par le décret n° 2015-1329 du 21 octobre 2015 relatif à l'allocation pour demandeur d'asile.

Il faut que le demandeur accepte les conditions matérielles d'accueil proposée par l'OFII, qu'il soit titulaire de l'attestation d'enregistrement de la demande d'asile délivrée par le Préfet, et que ses revenus soient inférieurs au 'revenu de

¹⁷ Article L. 744-5 du CESEDA.

¹⁸ Qui ne disparaît pas complètement et restera en vigueur 'pour une durée déterminée' pour les bénéficiaires de la protection subsidiaire et les apatrides.

solidarité active¹⁹ (à la fin de l'année 2015, il était fixé à € 524 pour une personne seule, € 94 pour un couple avec enfant²⁰).

En pratique, le montant journalier pour une personne est de € 6.80. Il est de € 10.20€= pour une famille de deux personnes, de € 13.60 pour une famille de 3 personnes, de € 17 pour une famille de 4 personnes et de € 20.40 pour une famille de cinq personnes. Un montant journalier additionnel de € 4,20 est versé à chaque demandeur d'asile adulte ayant accepté l'offre de prise en charge, auquel aucune place d'hébergement ne peut être proposée.

2.5 Le Droit au Recours

Les articles 21 et 22 de la Directive ont renforcé l'obligation de mettre à disposition des demandeurs une assistance juridique et une représentation gratuite *'à la demande, dans la mesure où cette aide est nécessaire pour garantir un accès effectif à la justice'*. Dans la suite de l'article 26, pourtant, la directive est formulée de manière à laisser une marge de manœuvre très large aux États membres, qui pourront ainsi refuser aux demandeurs d'asile cette aide gratuite sous certaines conditions, par exemple lorsque *'le recours ne présente aucune probabilité réelle d'aboutir'*. En l'espèce, la législation française ne comporte pas de dispositions renforçant ou précisant le droit des demandeurs d'asile au bénéfice de l'aide juridictionnelle prévue par la loi n°91-647 du 10 juillet 1991 relative à l'aide juridique, dans le cadre des recours qu'il pourrait intenter contre les décisions relatives à ses conditions d'accueil²¹. Il reviendra donc classiquement aux différents bureaux d'aide juridictionnelle de se prononcer sur l'admission à l'aide juridictionnelle des demandeurs qui entendraient contester les décisions prises à leur encontre dans le cadre du dispositif national d'accueil.

3. UNE TRANSPOSITION EN PARTIE ERRONEE: FOCUS SUR L'ACCES A L'EMPLOI

Crispation française, mais pas seulement, l'accès au marché du travail des demandeurs d'asile a finalement été réaffirmé par la Directive (article 15), tout en aménageant des voies de sorties avec la possibilité d'activer des clauses de préférence nationale ou communautaire, ou de séjour régulier (art. 15.2).

Dans le projet de loi, ce droit était totalement passé sous silence, alors même qu'il aurait pu insister sur les termes limitatifs qui permettent en pratique à l'Administration de circonscrire ce droit.

D'après l'article 15 de la Directive, les Etats doivent permettre un accès effectif au marché du travail dans un délai maximum de 9 mois (dans la version 2003 de la Directive ce délai était fixé à 12 mois). Le texte européen indique clairement

¹⁹ Articles L. 262-2 à L. 262-12 du code de l'action sociale et des familles.

²⁰ Décret n° 2015-1231 du 6 octobre 2015 portant revalorisation du montant forfaitaire du revenu de solidarité active.

²¹ Seules les dispositions relatives au recours devant la Cour nationale du droit d'asile ont été précisées.

que les Etats, sauf à arguer d'une situation économique justifiant les clauses de préférence, doivent *'garantir que les demandeurs aient un accès effectif à ce marché'*.

La loi française s'est livrée à une transposition très libre en disposant que, si aucune décision n'a été prise par l'OFPPA dans un délai de neuf mois, le demandeur 'peut être autorisé' à accéder au marché du travail (art. L. 744-11). Ce n'est donc pas **dans** un délai de 9 mois, mais **à expiration** d'un délai de 9 mois, que le demandeur pourra, non pas se prévaloir d'un accès au marché du travail mais demander l'autorisation de tenter d'y accéder, et cela est doublement contraire à la Directive.

Ainsi, et étant précisé que la Directive ne garantit naturellement aucun droit au travail (il ne saurait s'agir d'un droit créance), la loi française empêche l'accès au marché du travail pendant 9 mois et subordonne ensuite cet accès à une autorisation.

4. DANS UN CONTEXTE OU L'ETAT EST CONDAMNE PAR LE CONSEIL D'ETAT POUR LES CONDITIONS D'ACCUEILS DES DEMANDEURS D'ASILE A CALAIS.

Cette présentation de la transposition de la directive 'Accueil' en France se termine par une note très négative, forcée par la concomitance du dispositif de transposition et le spectacle déplorable donné par l'Etat dans la 'jungle de Calais', qui démontre que les standards d'accueil sont parfois et en pratique loin d'être respectés.

A la fin de l'année 2015, l'Etat a d'ailleurs été sévèrement condamné par le Conseil d'Etat au sujet des conditions d'accueil et de vie des migrants (dont des demandeurs d'asile ... mais la plupart ne souhaitent pas demander l'asile en France). Rappelons qu'après la fermeture du centre de Sangatte en 2002, les migrants se sont dispersés sur le territoire de la commune de Calais ce qui a donné lieu à l'apparition de squats, campements et bidonvilles. Un centre d'accueil et d'hébergement a été ouvert en avril 2015 mais la population a doublé (de 3000 à 6000) en septembre 2015 du fait d'un double phénomène d'arrivée massive (du fait notamment de la 'crise' des réfugiés), et de sédentarisation des gens présents.

Par une ordonnance du 25 novembre 2015, le juge des référés du Conseil d'Etat a enjoint à l'Etat de rendre un minimum de dignité aux migrants présents dans le bidonville²². Initialement saisi par deux associations et quatre 'résidents' du camp, le juge des référés du tribunal administratif de Lille avait fait droit à certaines des 30 conclusions à fin d'injonction présentées par les requérants²³, mais l'Etat et la Commune de Calais ont fait appel de cette ordonnance et il est ainsi revenu au Conseil d'Etat de sanctionner de sa haute autorité les conditions de vie dans lesquelles l'Etat a laissé les migrants de Calais.

²² CE, Ord., 25 novembre 2015, Ministre de l'Intérieur – Commune de Calais, n°394540, 394568.

²³ TA Lille, ord., 2 novembre 2015, Association Médecin du Monde et a., n° 1508747.

Ce qu'il faut retenir, c'est que dans le cadre de son office du juge des référés liberté, qui exige de se prononcer sur l'existence d'une urgence et sur la violation grave et manifestement illégale portée à une liberté fondamentale,²⁴ le juge administratif a retenu la violation de la liberté fondamentale consistant à ne pas être soumis à des *traitements inhumains et dégradants*, ce qui souligne l'extrême gravité de la situation, mais ne surprend pas lorsqu'on lit les éléments ressortis de l'instruction: accès manifestement insuffisant à l'eau potable et aux sanitaires; aucun ramassage des ordures à l'intérieur du site; présence de rats, d'eaux usées, d'excréments ; impossibilité, pour les véhicules, de circuler à l'intérieur du site (notamment en raison de la prolifération des tentes).

Aussi, après avoir considéré que

'les conditions de vie rappelées ci-dessus font apparaître que la prise en compte par les autorités publiques des besoins élémentaires des migrants vivant sur le site en ce qui concerne leur hygiène et leur alimentation en eau potable demeure manifestement insuffisante et révèle une carence de nature à exposer ces personnes, de manière caractérisée, à des traitements inhumains ou dégradants, portant ainsi une atteinte grave et manifestement illégale à une liberté fondamentale',

et après avoir placé la dignité concrète²⁵ des migrants au centre de sa décision, le Conseil d'Etat a enjoint à la Commune de Calais, comme à l'Etat (parce qu'en partie propriétaire des lieux et parce que les mesures à prendre excèdent les pouvoirs de police générale du maire de la commune) ont reçu injonction (sous astreinte) de: 1) créer sur le site dix points d'eau supplémentaires comportant chacun cinq robinets, cinquante latrines à fosse ou cuve étanche compte tenu de la nature sablonneuse du terrain d'assiette du camp; 2) mettre en place un dispositif de collecte des ordures avec l'installation de conteneurs-poubelles mobiles de grande capacité à l'intérieur du site et/ou de bennes supplémentaires; 3) procéder à un nettoyage du site et, enfin, de créer un ou plusieurs accès à l'intérieur du camp pour permettre l'accès des services d'urgence et le cas échéant le déplacement des conteneurs-poubelles ; 4) recenser les mineurs isolés et se rapprocher du département en vue de leur prise en charge.

En réaction, l'Etat a entrepris de démanteler le camp. Drôle d'exécution de la décision de justice...

²⁴ Art. L. 521-2 du code de justice administrative.

²⁵ V.D. Roman & S. Slama, 'Bidonville de Calais: injonction à l'Etat d'humaniser la jungle', *D.* 2015, p. 2624.

6. Reception Conditions Directive – Implementation in Poland

Mieczysława Zdanowicz & Tomasz Dubowski

1. INTRODUCTION

Implementation of the Reception Conditions Directive¹ is, quite naturally, perceived in the context of the recent migration crisis in the European Union (EU). Poland is, of course, a state responsible for policing a considerably long section of the EU's external border. However, the main migration routes from North Africa and the Middle East seem to have bypassed Poland in the last two years. In effect, Poland does not find itself among the most favourite destination countries for those who have already reached EU territory and will probably go through the relocation procedure² or who have already left Greece and Italy unlawfully. At the moment Poland has avoided experiences keenly felt in the southern regions of Europe but this doesn't mean that the migration crisis remains a purely theoretical problem from a Polish perspective. The situation may change depending, for instance, on circumstances in the Ukraine and on potential changes in the run of existing migration routes or emergence of new ones. And, what is most important, the current situation does not relieve any Member State of its obligation to implement EU directives efficiently and on time. Poland is not an exception in that respect. In this light, the migration crisis Europe is facing right now, gives a new and interesting context for the appraisal of the EU asylum system development and functioning, including reception conditions standards.

Considering the above remarks, in this contribution we focus on three main issues. Firstly, the question of the Directive's formal implementation procedure in Poland is addressed. Secondly, the material scope of the implementation process is explained by highlighting shortcomings in the Polish legal system and the way the legislator decided to meet the Directive's standard by introducing certain amendments. Finally, the practical aspects of reception conditions in Poland are illustrated. Despite the fact that Polish legal regulations in that field weren't verified in practice to the extent experienced by other Member States, the issue of practice seems to be central to the article as a whole.

¹ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, OJ L180, 29.06.2013.

² Cf. Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L 248, 24.9.2015.

2. DIRECTIVE'S IMPLEMENTATION PROCEDURE IN POLAND

Poland has officially declared 17 national implementing measures (NIM's) including: *the Administrative Procedure Code, the Criminal Procedure Code, the Family and Guardianship Code, the Law on Civil Service, the Law on Personal Data Protection and the Constitution of the Republic of Poland*. The main NIM, however, was *the Act amending the Law on the Protection of Foreigners in the Territory of the Republic of Poland and other certain Acts*³ (hereinafter: the Act) which was planned to be an instrument of a complex implementation of the larger part of the so-called asylum package and the Union's *acquis* in this area.

The procedure aiming at the adoption of the Act began with the draft prepared by internal bodies of the Polish Government in May 2015 and it is worth recalling that the deadline for implementation had been set for the 20th of July 2015. The Government adopted the draft and forwarded it to the lower chamber of the Polish Parliament – the Sejm. The first step in parliamentary legislative procedure (first reading) took place in June 2015 and the draft was immediately forwarded to the Parliamentary Commission of Internal Affairs. The Commission presented its report on the 7th of July and the second reading was held the day after. The act was adopted by the Sejm in the third reading on the 9th of July 2015. However, in the Polish legal system this does not mark the end of the parliamentary stage of the procedure. The act adopted by the Sejm has subsequently to be forwarded to the upper chamber of the Parliament – the Senat – which occurred on the 13th of July 2015. The Senat has a right to introduce amendments to the text adopted by the Sejm and, indeed, it made use of that right in this instance. On the 7th of August the amendments presented by the Senat were forwarded to the Parliamentary Commission of Internal Affairs and the report of the Commission was made ready on the 9th of September. After receiving the Commission's remarks on the Senat's position and following debate, the Sejm accepted some amendments and finally adopted the Act on the 10th of September 2015. However, it took a further twenty-days for the President of the Republic of Poland to sign the Act, which happened on the 5th of October.

So, a delay in the Directive's implementation process in Poland is evident. Member States had to transpose the Directive and communicate the national transposition measures taken by 20th July 2015. In Poland this process (including presidential signature) took almost three months longer. In fact, the whole procedure took 5 months and no steps appear to have been taken to accelerate the process. What is interesting, is that after adoption of the Directive (June 2013) and prior to adoption of the implementing Act (September 2015), the Polish legislator managed to adopt a new Law on Foreigners (December 2013), which had to be amended (not to any large extent luckily) in order to conform with the

³ Ustawa z 10 września 2015 r. w sprawie zmiany ustawy o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej oraz niektórych innych ustaw (The Act amending the Law on the Protection of Foreigners in the Territory of the Republic of Poland and other certain Acts), Dz. U. z 2015 r., nr 0, poz. 1607 (OJ 2015, No. 0, item 1607).

Directive's standards. And of course, the revision was accomplished by the Act implementing the Directive in 2015.

The time lapse Poland allowed itself was not overlooked by the European Commission. In September it sent letters of formal notice to 19 Member States for not having communicated the national measures taken to fully transpose the Reception Conditions Directive.⁴ Poland, of course, found itself among those 19 states.

As mentioned before, the Act was supposed to be a comprehensive implementation of three EU acts falling into the European asylum package.⁵ As such, the Act amends over 10 other Laws, including: *the Act on the participation of Poland in SIS and VIS*, *the Law on the Education System*, *the Law on the Border Guard*, *the Law on Social Care*. To the largest extent the Act amends, however, *the Law on the Protection of Foreigners in the Territory of the Republic of Poland*, adopted in 2003 and previously amended in 2012 (hereinafter: LPF). Since this Law specifies rules, conditions, procedures and organs relevant in the context of the protection granted to foreigners in the territory of Poland and has undergone the deepest revision, further considerations focus on the amendments to this particular act.⁶

3. MATERIAL SCOPE OF DIRECTIVE'S IMPLEMENTATION

The amendments introduced by the Act (principally amendments in LPF) were – to the largest extent – oriented towards compliance of Polish law with the Directive in the following areas: documentation (Art. 6 (1) of the Directive), detention (Art. 8 (3) and Art. 9 (1)(4) of the Directive), material reception conditions (including modalities, reduction and withdrawal thereof – Art. 18 (2)(6), Art. 20 (4)(5) of the Directive) and position of vulnerable persons and minors (Art. 21, 22, 23 (1)(2) and Art. 24 (3) of the Directive). Amendments in LPF concerning those Directive's provisions are addressed below.

⁴ European Commission – Press Release, More Responsibility in managing the refugee crisis: European Commission adopts 40 infringement decisions to make European Asylum System work, Brussels, 23 September 2015, http://europa.eu/rapid/press-release_IP-15-5699_en.htm [access: 28.01.2016].

⁵ The Act transposes: Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, OJ L180, 29.06.2013 and Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ L180, 29.06.2013. The Act also serves the application of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ L180, 29.06.2013.

⁶ Amendments of purely technical character are of course omitted.

3.1 Documentation

According to Art. 6 (1) of the Directive, Member States must ensure that the applicant is provided with a document (issued in his or her own name) certifying his or her status as a person applying for international protection. Such document should be issued within 3 days of the lodging of the application for protection. The requirement for immediate issuance of such a document (3 days) had not been present in the LPF before. The Directive's provisions created a need to amend Art. 55 LPF and to add a new Art. 55a. Now, in the light of those (amended and added) provisions it is ensured that the applicant (and his/her spouse) is provided with a document certifying his status within 3 days (Art. 55 (1) LPF). It is the so-called temporary ID certificate which confirms the applicant's identity and allows him/her to stay in the territory of Poland till the application is examined with a final decision (new Art. 55a LPF). The first certificate is in principle valid for a period of 90 days, with subsequent certificates issued for periods of 6 months (Art. 55a LP).

The first ID certificate is issued by the Border Guard as the organ which has accepted the application for international protection. Subsequent certificates are issued by the Head of the Office for Foreigners – new Art. 55b LPF. The LPF also now provides a legal basis for issuance of a certificate to an applicant who has been transferred to Poland by another Member State within the framework of Regulation 604/2013 and who had applied for international protection before leaving Poland and has declared the will to continue applying for this protection – amended Art. 55 (2) LPF. However, in such a case the ID certificate is issued by the Chief of the Border Guard Unit having jurisdiction over the place of the transfer and only for ten days.

Temporary ID certificates are issued *ex officio*.

3.2 Detention

Article 8 (3) of the Directive identifies the grounds for detention of an applicant and states that an applicant may be detained only in order to determine or verify his/her identity or nationality; to determine those elements on which the application for international protection is based which could not be obtained in the absence of detention and in order to decide on the applicant's right to enter the territory. Detention is also possible when an applicant is detained subject to a return procedure under Directive 2008/115/EC or when the protection of national security or public order so requires or in accordance with Article 28 of Regulation (EU) No 604/2013. At the same time those grounds for detention should be laid down in national law.

The list of grounds for detention provided for by the LPF before the Directive's implementation differed from the one presented in the Directive itself. Of course, certain similarities were visible, e.g. matters of national security and public order protection as well as verification of the applicant's identity. Nevertheless, the Polish legislator decided to follow the Directive's provisions directly. In consequence the provisions of Art. 8 (3) (a)(b)(d)(e) were in principle copied and introduced to an amended Art. 87 (1-5) LPF. In the case of Art. 8 (3)(f) of the

Directive (detention in accordance with Regulation 604/2013) it has been specified that detention is possible only when there is a risk of the applicant absconding – amended Art. 87 (1)(5) LPF.

In relation to Art. 9 (1) of the Directive the Polish legislator put particular attention on the final sentences:

Administrative procedures relevant to the grounds for detention set out in Article 8(3) shall be executed with due diligence. Delays in administrative procedures that cannot be attributed to the applicant shall not justify a continuation of detention.

The need for implementation of this provision resulted in certain amendments in Art. 89 LPF. Now, in general, the court orders the detention of an applicant for a period of 60 days (grounds for detention expressed in Article 8(3) of the Directive apply) which may be extended for a further 90 days – Art. 89 (1)(3) LPF. In a case where the application for international protection is not examined with a final decision, the court may extend the detention for a period necessary for the issuance of such decision – Art. 89 (4) LPF. However, the court will not extend the detention period in a case where the proceedings concerning the existence of grounds for detention (set out in the Directive) are not finished and the delay in that respect cannot be attributed to the applicant – art. 89 (4a – new) LPF.

Finally, Art. 9 (4) of the Directive has been transposed directly into Art. 88b (4 – added). Now, this modified LPF provision, together with the Criminal Procedure Code and the Law on Foreigners (LF), seems to provide the Directive's standard assuring information in writing and in a language applicants understand on the reasons for detention and their rights including possibilities of challenging the detention order, and the right to request the assistance of an advocate or legal advisor.

3.3 Material Reception Conditions

Article 18 (6) of the Directive states that Member States must *ensure that transfers of applicants from one housing facility to another take place only when necessary*. In the context of that provision a need for a (on the surface – small) modification of Art. 82 (1) LPF occurred. It was namely possible to make the applicant change the housing facility – to oblige him/her to change it – by invoking 'organisational conditions/reasons'. Now this obligation only applies in a situation where the transfer is 'necessary' because of organisational reasons.

In relation to Art. 18 of the Directive it is also worth noting, that the Polish legislator considered it necessary to express the applicant's right to contact his/her representative in conditions not violating the right for privacy directly in LPF. This complies with Art. 18 (2)(c) of the Directive, which states that e.g. legal advisers or counsellors are granted access in order to assist the applicants which might be limited only on grounds relating to the security of the premises and of the applicants.

In order to comply with Art. 20 (4) of the Directive the Polish legislator amended art. 76 (1) LPF. Now a foreigner is deprived of social assistance in case he/she seriously breaches the rules of an accommodation centre or in case his/her behaviour towards other foreigners or the staff of an accommodation centre is violent. Previously a more general provision had been applied – such a deprivation of social assistance had been possible in case of a flagrant violation of rules of social coexistence by a foreigner.

Finally, the general clauses included in Art. 20 (5) of the Directive (*access to health care (...)* and a *dignified standard of living for all applicants*) also caused certain amendments in LPF. Firstly, the legislator added Art. 71 (4) LPF which ensures that foreigners who benefit from social assistance are also entitled to receive funding for public transport fares. Secondly, Art. 78 (2) LPF has been amended and now, in case a foreigner has been deprived of social assistance twice (decision on the basis of Art. 76 (2) LPF), he/she may again be given social assistance benefits but only in an amount equal to 1/2 of the benefits originally granted. Previously this limit equaled 1/3 of the social benefits originally granted so the change towards dignified standards of living is noticeable.

3.4 Vulnerable Persons and Minors

Article 21 of the Directive expresses a general principle that Member States take into account the specific situation of vulnerable persons (e.g. minors, disabled people, pregnant women or victims of human trafficking). In turn, in Art. 22(1), it is stated that efficient implementation of Art. 21 requires that Member States should assess whether the applicant is a person with special reception needs and indicates the nature of those needs. Further parts of Art. 22 define more detailed rules for such assessment and the support provided to applicants with special reception needs.

In the light of these provisions the Polish legislator amended Art. 68 LPF – now, in cases where an application concerns a person who might require special treatment (LPF repeats here categories foreseen in the Directive), the Head of the Office for Foreigners is responsible for assessing whether the applicant concerned is a person with special reception needs. An applicant is considered a person with special reception needs when, for example, there may be a need to accommodate him/her in a special accommodation centre (e.g. adjusted to the needs of disabled persons) or a hospice. What's more, thanks to the amendment of Art. 69 LPF, in the case of a person with special reception needs the activities in the asylum procedure are performed in conditions ensuring freedom of speech and relevant in relation to the applicant's psychological and physical condition. These activities are also performed in period adjusted to the applicant's psychological and physical condition, in the place of his/her stay (if his/her health requires so) and with the attendance of a psychologist, medical doctor or a translator when there is a need.

According to Art. 23 (1) of the Directive the *best interests of the child shall be a primary consideration for Member States when implementing the provisions of this Directive that involve minors*. It is also required that standards of living ensured by Member States should be adequate for physical, mental, spiritual, mor-

al and social development of the minor. In assessing the best interests of the child, Member States must take due account of family reunification possibilities and the minor's well-being and social development as well as safety and security considerations, in particular where there is a risk of the minor being a victim of human trafficking, and the views of the minor in accordance with his or her age and maturity (Art. 23 (2) of the Directive).

The Polish legislator decided to implement these provisions directly. In principle they were copied and pasted into a new Art. 69b LPF, which states, e.g., that *by granting social assistance to a minor, the need to protect his/her best interest is taken into consideration*. Particular account shall of course be taken of the factors listed in Art. 23 (2) of the Directive.

In the light of Art. 24 (1) of the Directive (*Member States shall as soon as possible take measures to ensure that a representative represents and assists the unaccompanied minor to enable him or her to benefit from the rights and comply with the obligations provided for in this Directive ...*) it became necessary to amend Art. 61 (5)(6)(7) LPF. Now the Border Guard agencies, without delay, must apply to the guardianship court for the appointment of a representative of an unaccompanied minor (Art. 61 (5)(6) LPF) and the court appoints a representative, also without delay, no later than 10 days from the date of such application (Art. 61 (7) LPF). Especially the rule that a representative is appointed within 10 days seems important. Previously proceedings in that respect took at least 1,5 month.

Finally, in the light of Art. 24 (3) of the Directive (*Member States shall start tracing the members of the unaccompanied minor's family ... as soon as possible after an application for international protection is made ...*) the amendment of Art. 61(g) LPF became necessary. Previously it was just stated in LPF that the Head of the Office for Foreigners, whenever possible, starts tracing the unaccompanied minor's family. After necessary amendments the Head of the Office for Foreigners, immediately after receiving the application for international protection starts operations tracing the members of an unaccompanied minor's family, in particular: informs the minor about the possibility of tracing his/her family members through international NGO's and helps the minor to contact them as well as initiates tracing activities.

4. RECEPTION PROCESS IN POLAND – SOME PRACTICAL REMARKS

A person who wants to be granted international protection on the territory of the Republic of Poland should submit an application to the head of the Office of Foreigners through a competent authority of the Border Guard. He can do it while crossing the border (border control) entering the territory of Poland or during his stay in Poland.

A foreigner who applies for international protection may also do it on behalf of people accompanying him and dependent on him economically, in respect of health or age.

The applicant submits the application for international protection in person on an appropriate form. The application is enclosed with up-to-date photo-

graphs of the applicant and the people on behalf of whom the applicant acts, as well as documents indispensable to confirm the data included in the application and circumstances justifying the application for international protection.

If the application is to refer to other people as well (the applicant's minor children, spouse), these people also have to be present during the submission of the application, since a written consent of the spouse is required.

On behalf of a minor without guardians, the application for international protection is submitted by a probation officer or a representative of an international or non-governmental organization dedicated to granting assistance to foreigners, including legal assistance, if, on the basis of the individual assessment of the situation of the unaccompanied minor, the organization decides that he/she may need this protection.

In 2014, there were 3,402 applications for the refugee status, which concerned 6,625 people. The largest group applying for the refugee status were, in 2014, citizens of the Russian Federation: 2,772 people (42% of all applicants). The second largest group of foreigners applying for the refugee status were citizens of Ukraine: 2,253 people (34%). Moreover, the refugee status was most often applied for by citizens of Georgia: 652 people (10%), Armenia: 126, Tajikistan: 107 people, Syria: 104 people and Kirgizstan: 101 people.⁷

The authority of the Border Guard competent to receive the application for international protection establishes the identity of the person to whom the application refers; obtains the data and information necessary to fill in an application form; takes a photograph of the person concerned and takes his/her fingerprints with dactyloscopic cards or with a device for electronic fingerprinting; establishes if the person concerned possesses documents authorizing to cross the border or stays on the territory of the Republic of Poland legally; provides the assistance of an interpreter at submitting the application; conducts an individual interview; secures medical examinations.

The applicant is also informed in writing and in the language he/she understands about the rules and procedure of granting international protection as well as about his/her rights and responsibilities resulting from the fact of application, as well as about social and medical assistance and free legal assistance.

The authority of the Border Guard also issues (3 days of the reception of the application at the latest) an identity certification of a foreigner valid for 90 days.

The authority of the Border Guard registers immediately the application and within 48 hours passes it to the Head of the Office for Foreigners.

The applicant is also informed of the address of the reception center where he/she should appear within 2 days of the submission of the application. These

⁷ Information of the Head of the Office for Foreigners on the application in 2014 of the Act of 13 June 2003 on the Protection of Foreigners in the Territory of the Republic of Poland (OJ 2003 r. No 128, item 1176 as amended) in the scope of performing obligations of the Republic of Poland resulting from the Geneva Convention referring to the refugee status and the New York Protocol referring to the refugee status, file:///C:/Users/user/Downloads/Informacja-Szefa-Urz%C4%99du-do-Spraw-Cudzoziemc%C3%B3w%20(1).pdf, p. 3.

are two reception centers of the Department of Social Welfare: in Biała Podlaska, if the application is submitted for the first time and in Podkowa Leśna-Dębak, when foreigners submit a subsequent application or returned within the framework of the Dublin procedure. If the foreigner fails to report to the reception center within two days, the procedure of granting the refugee status is discontinued. Disabled people, old people, single parents and pregnant women whom the application concerns, are provided by the Border Guard with transportation to the reception center, as well as, in justified cases, board during the transportation. The applicant, after appropriate medical examinations and status interview, is transferred to another center on the territory of the country.

During the whole procedure the people may stay in the center or outside.

Staying in the center the foreigner is provided with, for example: accommodation, board, reimbursement for public transport fares, money for personal cosmetics (PLN 20 a month) and the so-called pocket-money (PLN 50 a month), one-off financial aid for clothes and footwear purchase (PLN 140).

The foreigner outside the center receives cash benefits in order to cover costs of the stay on the territory of Poland. The amount of the benefit depends on the number of his/her family members and the monthly amount per person is PLN 750, whereas a monthly amount per person in a four-person family is PLN 375.

Foreigners in the procedure are provided with a guaranteed access to public schools (including a school kit and textbooks), a free course of the Polish language, medical, psychological and dental care.

The procedure referring to international protection should last no longer than 6 months of the day of application. This period may be prolonged to 15 months if:

1. the case is particularly complicated;
2. a great number of foreigners apply for international protection in short intervals;
3. the applicant fails to perform his/her responsibilities connected with producing appropriate information and evidence and fails to appear when summoned by the authority.

If the case concerning granting international protection is not settled within 6 months and the delay was not caused by the applicant, the Head of the Office, on request of the person, may issue a certificate which entitles this person to work on the territory of the Republic of Poland.

Granting the assistance ends with the moment of receiving a final decision in the procedure of granting international protection.

Foreigners who receive a positive decision may within 60 days submit an application for an Individual Integration Program conducted by poviát (district) family support units.

5. SUMMARY

The process of implementing the Directive in Poland (in terms of legislative activities) took round 5 months which in itself may not be considered a long period. The problem was that the whole legislative procedure aimed at implementation of the Directive started quite late, resulting in delays that were not altogether avoidable. However, such delay turned out to be common ground for over a half of the EU Member States involved.

The *Act amending the Law on the Protection of Foreigners in the Territory of the Republic of Poland and other certain Acts*, as an act transposing the Directive into the Polish legal system was designed as a comprehensive implementation instrument for a bigger part of EU *acquis* in the sphere of the EU asylum system. As such it amends a number of Polish Laws dealing – to a different extent of course – with migration issues and status of foreigners in Poland. The scope of amendments is the largest in relation to the *Law on the Protection of Foreigners in the Territory of the Republic of Poland* (which is reflected in the Act's title) and the above considerations focused on this particular Law.

In general it may be stated that the main developments in Polish law refer to the following areas covered by the Directive: issues of documentation, problems of applicant's detention, questions of material reception conditions (including modalities, reduction and withdrawal thereof) and position of vulnerable persons and minors. The implementing measures taken and described earlier are of course supplemented by amendments introduced to other Polish Laws, which was only briefly mentioned above. In general, the first impression is that the results of the implementation process seem to correspond with the Directive's standard.

Polish regulations in respect of reception conditions have not been verified in extreme conditions of migration crisis. They were and, so far, rather still are being tested in conditions that might be called 'normal'. Polish participation in relocation procedure probably doesn't change much since the number of migrants expected in 2016 is estimated on the level of 400 people only.⁸ However, the practical aspects of the Polish reception system – its selected elements – have also been presented in this chapter. It is necessary in order to give a more complete picture of the problem being analyzed here.

⁸ It is worth noting, however, that after terrorist attacks in Brussels (March 2016) Polish Government has hardened its position on accepting asylum seekers and, according to recent statements presented in media, under present circumstances – for the time being – it does not see a possibility for refugees to come to Poland.

7. The Italian Reception System

Claudia Pretto & Simone Penasa *

1. A PREMISE

On the 1st October 2015 the Italian system implemented the Asylum Reception Directive 33/2013/EU through Legislative Decree no. 142 of the 18th August 2015, which transposed into the Italian legal system both European Directives on Asylum Procedures and Reception Conditions of asylum seekers.¹

The Italian reception system is composed by three different reception facilities: the first reception centres: after the arrival by sea or the entry into the national territory; the second reception facilities: after the arrival, asylum seekers and migrants may be placed in temporary emergency centres managed by local Prefectures and the third category of centres: centres of system of reception with specific projects of integration.²

- I. Centres for Accommodation of Asylum Seekers (CARA). CARA were established in 2008 and replaced previous identification centres, these reception centres are called hubs in legislative decree 142/2015; Accommodation Centres (CDA), for general purposes of accommodation of migrants and also used for asylum seekers; First Aid and Reception Centres (CPSA), for the first aid and identification before persons are transferred to other centres;
- II. Emergency Reception Centres (CAS), introduced in October 2013 after the Mare Nostrum Operation in response to the increasing influx of sea arrivals in Italy;³
- III. The places inside the SPRAR facilities, the facilities of the Italian system of protection for asylum seekers and refugee conceived on 1989, which in time evolved into a full reception and integration system.

* Views expressed herein are those of the authors and do not necessarily reflect the position of UNHCR or the United Nations. Claudia Pretto is the author of paragraphs 1 and 4; Simone Penasa is the author of paragraphs 2 and 3.

¹ Decreto Legislativo, 18 agosto 2015, n. 142, Attuazione della direttiva 2013/33/UE recante norme relative all'accoglienza dei richiedenti protezione internazionale, nonché della direttiva 2013/32/UE, recante procedure comuni ai fini del riconoscimento e della revoca dello status di protezione internazionale (OJ n.214, 15/9/2015). See at: <http://www.gazzettaufficiale.it/eli/id/2015/09/15/15G00158/sg>.

² Out of this division there are the administrative detention centres called CIE – Centres of identification and expulsion where asylum seekers with previous expulsion could be detained under European Directive 2008/115.

³ See more at: <http://www.asylumineurope.org/reports/country/italy/reception-conditions/short-overview-italian-reception-system#sthash.K10otOWf.dpuf>.

According to Legislative Decree 142/2015, first reception is guaranteed into the governmental accommodation centres in order to carry out the necessary operations to define the legal position of asylum seekers concerned. It is also guaranteed in the temporary facilities, specifically set up by the Prefect upon the arrival of a great influx of refugees, due to unavailability of places in the first and second level accommodation centres. Indeed, accommodation in temporary reception structures is limited to the time strictly necessary for the transfer in the first or second reception centres.

Some temporary reception facilities have also been established for persons returned to Italy under the Dublin Regulation through specific projects, but these places seems not to be enough and many *Dubliners* returned: asylum seekers sent back to Italy from another Member State due to the Dublin Regulation prescription have no adequate reception as underlined by the European Court of Human Rights in its *Tarakhel* decision.⁴

1.1 The Hotspot Approach

The emergency of refugee arrivals in the Hellenic and Balkans territories created the fortress Europe answer. European Commission and European Council decided not to implement the Directive on Temporary Protection but to improve a system of relocation based on redistribution after a compulsory identification from in the Member State of arrival and for the first time the *hotspot approach* entered into the European system without any legal instrument.

The European Council, in its Conclusions of 25-26 June 2015 created, in close collaboration with the host Member States, a roadmap by July 2015 on the legal, financial and operational aspects elaborating the concept of the 'Hotspot approach', consisting of: registration, identification, fingerprinting and information on asylum and relocation as well as return operations. Those which, after the information part, would ask for asylum and persons (such as Syrian and Eritrean people) in title for relocation, will be immediately routed to an asylum procedure where EASO support teams will help to process asylum applications as quickly as possible. The explanatory note and the roadmaps have been prepared in close collaboration with the EU Agencies and with the host Member States, in this case, Italy and Greece.⁵ It is given that it is an approach, not a physical place. The

⁴ The European Court of Human Rights found a violation of Article 3 (prohibition of inhuman or degrading treatment) of the ECHR if an Afghan couple and their six children could be sent back to Italy under the Dublin Regulation without having first obtained individual guarantees from the Italian authorities that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together, see ECtHR, *Tarakhel v. Switzerland*, Application no. 29217/12

⁵ See among all Hotspots in Italy, The Ecre interview to Italian Council of Refugee <http://www.ecre.org/component/content/article/70-weekly-bulletin-articles/1210-hot-spots-the-italian-example-conversation-with-christopher-hein-from-cir-.html>; Sergio Carrera, Steven Blockmans, Daniel Gros & Elspeth Guild, *The EU's Response to the Refugee Crisis Taking Stock and Setting Policy Priorities*, Ceps Essay No. 20, Brussels: CEPS →

hotspot approach can exist anywhere, where are put in place simultaneously all the actions mentioned, and everywhere and in all the cases in which all the actors are working together: Frontex officers, European Asylum Support Office (EASO) officers and all the national authorities involved in the asylum procedure.

The Council Decision (EU) 2015/1523 of 22 September 2015 established provisional measures on international protection for the assistance of Italy and Greece, in fact the Council adopted two legally binding decisions, which established a temporary, and exceptional relocation mechanism for 160,000 applicants in clear need of international protection from Greece and Italy.⁶ This decision and these mechanisms as a matter of facts entered into the reception and protection asylum schema described above.

The Roadmap based on Council Decision 2015/1523 of September 2015 also includes actions undertaken by Italy to face the influx of migrants, which are also part of the requirements of the decisions adopted on relocation and hotspots.⁷ The circular is divided into four sections, focusing especially on 'capacity' and asylum 'procedures', including relocation.⁸

The complementary measures that Italy and Greece have to adopt include the submission of a roadmap that provides measures to: 'improve the capacity, quality and efficiency of the Italian system in the fields of asylum, early reception and repatriation and ensuring the correct measures for enacting the decision'.⁹

The Roadmap does not conform exactly to legislative decree no. 142 of 18 August 2015. In fact, in the Reception legislative decree 142/2015 there is no mention of hotspots: these entered into the Italian legal system through the mentioned Council decision, but without any national legal transposition. In particular this lack into the national law opens the reflection on the legal nature of *hotspots*, that from one side could be seen as an instrument to have access to relocation system and to a protected and fair reception system; from the other side the distinction between categories of migrants based on nationality to have access to the asylum procedure and reception could, case by case, caused a direct violation of Article 33 of the Refugee Convention and the risk to create asy-

2015, see https://www.ceps.eu/system/files/EU%20Response%20to%20the%202015%20Refugee%20Crisis_o.pdf.

⁶ Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece and Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

⁷ See the Italian Minister Of interior Circular through which the European Council decision entered into forced: http://www.immigrazione.biz/upload/circolare_ministero_interno_n_14106_del_6_10_2015_hotspot_accoglienza.pdf.

⁸ Relocation could be an important instrument if it could be based not just on nationality requirements and special needs requirements, but also on personal requests of asylum seekers. In March 2016 European Union: European Commission, Communication from the Commission to the European Parliament, the European Council and the Council: First report on relocation and resettlement, 16 March 2016, COM(2016) 165 final, available at: <http://www.refworld.org/docid/56e987d24.html>.

⁹ At p. 2 of the mentioned Roadmap.

lum seekers in orbit, while, as we know, one of the objective of the Common European Asylum System was to avoid asylum seekers in orbit.¹⁰

According to the Italian Roadmap, the first reception centres (CARA/CDA and CPSA) are turned into *Regional Hubs*, which are supposed to act as reception structures where the applicants will formalize their asylum requests through the fulfilment of the asylum request form 'called C3 file', where unaccompanied minors should be identified and where there should be the possibilities to organized internal family reunification movements if possible. The asylum seekers can stay in the hubs for a period from 7 to 30 days and thus ensure a fast turnover, but in reality they are staying longer due to the lack of capacities in the Prefect's emergency centres and due to the limited places into the SPRAR System (see above).

1.2 Protection of Vulnerable People and the Gaps due to 'Emergency Approach'

Legislative Decree n. 142 of 2015 prescribes specific actions to create adequate reception of unaccompanied minors in the light of the best interest of the child: experts on childhood in the minors' reception centres, monitoring instruments; minors at risk of trafficking should have adequate assistance from the first reception step in the hub to the emergency governmental centres and then into the SPRAR facilities.

However, in the Italian legal system there is, at the moment, no mention of asylum seekers unaccompanied minors and family detention. There are no formal facilities to detain, except the required identification procedure, unaccompanied minors or families with minors

Article 17 of Legislative Decree 142/2015 endorses specific reception centres for persons with special needs: victims of trauma, victims of trafficking, minors and persons with disabilities.

For the first time in the Italian legal system, there is a compulsory *liaison* between the person in need of international protection and victims of trafficking. As we know, among refugees there could be victims of trafficking of human beings and among victim of trafficking of human beings there could be refugee; for this reason the main challenge is to guarantee an adequate reception system to protect those people at risk of trafficking and exploitation also in the country of asylum.¹¹

Articles 18 and 19 prescribe compulsory centres for the first minors' identification, health care assistance, bid procedures and family link procedure in case of relocation – family reunification. At the moment the main gap to activate

¹⁰ See on the hotspots and relocation issues the recent brilliant analysis written by Francesco Maiani: <http://eumigrationlawblog.eu/hotspots-and-relocation-schemes-the-right-therapy-for-the-common-european-asylum-system/>.

¹¹ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

immediately the adequate protection to minors is the delay in the guardianship appointment and the absence of a fair age assessment procedure, in fact authorities are using inappropriate medical invasive examination rather than an holistic approach and a multidisciplinary examination also with dialogue with psychological experts.¹² The delay in the appointment of a guardian involves the delay in intake in Reception facilities suitable for unaccompanied children with the risk of abuse and violations against minors.

The choice to be sent to one centre or to another is in many cases connected to the reception places that are at disposition in that moment. In many cases, due to the high percentage of unaccompanied minors, these places are not enough to face to the arrivals of minors and there are many minors waiting in temporary centres with adults who could become victims of trafficking and exploitation during this delay. As we know, around 10.000 unaccompanied minors have arrived in 2015, who disappeared after their arrival.¹³

Italy is a destination, transit, and source country for women, children, and men subjected to sex trafficking and forced labor. Experts believe the overall number of trafficking victims in Italy is increasing due to the dramatic rise in migrants and asylum seekers arriving by boat escaping war and oppressive political, social, or economic conditions. For the first time in the Italian legal system, through the implementation of the recast reception conditions directive, there is a legal connection between the system of victims of trafficking in human beings and asylum seekers.¹⁴

2. THE ITALIAN RECEPTION SYSTEM: FROM THE FIRST AID/QUALIFICATION TO ORDINARY RECEPTION (SPRAR)

Turning the analysis to the reception system, it is structured in two dimensions: the reception following a situation of emergency, on the one hand; the 'ordinary' reception, based on a well-settled and permanent system dispersed through the whole Italian territory, on the other hand.

The declared purpose of this multi-level system of reception of asylum seekers and refugees is to overcome the 'state of emergency', related to the recent

¹² Position Paper on Age Assessment in the Context of Separated Children in Europe 2012 Separated Children in Europe Programme (SCEP), see <http://www.refworld.org/pdfid/4ff535f52.pdf>. At the moment during the asylum procedure, in some cases asylum seekers, during the interview, demonstrate to be minors through a multidisciplinary examination only due to legal and NGOs support. In these cases unaccompanied minors have been hindered in their access to adequate reception assistance. Nowadays in Italy due to the delay in all the court procedures a minor could wait for a Guardian appointment from one month to more than six months. Without a guardian appointment it is not possible to guarantee in practice the best interest of the child because an unaccompanied minor should have access to a Guardian that has to help him/her also.

¹³ See among all: <http://missingchildreneurope.eu/Missingunaccompaniedmigrantchildren>.

¹⁴ See United States Department of State, *2015 Trafficking in Persons Report - Italy*, 27 July 2015, available at: <http://www.refworld.org/docid/55b73bdfc.html>.

massive flow of migrants,¹⁵ and to implement an ordinary – stable planned and permanent – National Program of Reception and Integration based on the 'loyal collaboration' between different levels of government.¹⁶

However, it must be underlined that SPRAR does not cover the entire demand of reception/assistance: more or less 1/3 of the persons involved in asylum procedures is covered. In this regard, the last call for participation to the SPRAR system (2015) has increased the scheduled places up to 30.000 (2016-2017), instead of the previous 20.000 places (2014-2016).

The implementation of the Directive 2013/33/EU through the already mentioned legislative decree n. 142/2015 has allowed the Italian Government to rationalize and reinforce the previously existing system of reception, established by the Law n. 189/2002 (the 'Bossi-Fini' Law) which reformed the law n. 39/1990 (the so-called 'Martelli' Law). Starting from this reform, it is possible to refer to the Italian reception mechanisms as 'SPRAR system', within which the role of local bodies is recognized as decisive in strengthening an understanding of the reception linked to the integration of migrants. Therefore, it can be said that the 'Bossi-Fini' Law has institutionalized the reception system, which already existed on the territory.¹⁷ According to Article 32 of the 'Bossi-Fini' Law, local entities which provide services for the reception of asylum seekers and the protection of refugees and migrants holding other forms of humanitarian protection can offer those services also for the asylum seekers with no livelihood.¹⁸

Legislative Decree n. 142/2015 has institutionalized a multi-phase reception system, which is now structured on two levels: the 'first reception' mechanism and the 'second reception' one, which is grounded on SPRAR. In implementing the EU Directive, the legislative decree goes beyond the common standards of reception provided for at the EU level (right to housing, food, clothing and daily expenses allowance). The aim of the Italian Government is to guarantee an 'integrated reception', that goes beyond the mere provision of board and lodging, but includes orientation measures, legal and social assistance as well as the development of personalized projects for the social-economic integration of individuals.

¹⁵ According to the data provided by the Italian Government, migrants arrived by sea in 2015 are 153.842, which represents 9% less than in 2014 (170.100). The number of migrants hosted in the different accommodation structures (reception centres (Cpsa, Cda, Cara), Centres for identification and expulsion (Cie), temporary structures (CAS), SPRAR system) in Italy is 111.081 (31 March, 2016).

¹⁶ For a critical analysis of the system, see G. Schiavone, 'Il diritto d'asilo in Italia dopo il recepimento nell'ordinamento delle normative comunitarie. Uno sguardo d'insieme tra il de iure e il de facto', *Mondi Migranti*, n. 3, 2009, p. 70 ff.

¹⁷ E. Benedetti, *Il diritto di asilo e il sistema di protezione nell'ordinamento comunitario dopo l'entrata in vigore del Trattato di Lisbona*, Padova 2010, p. 246.

¹⁸ L. Castelli, 'Il ruolo degli enti locali nell'integrazione e partecipazione dei migranti', in: L. Rochetti (a cura di), *I diritti di cittadinanza dei migranti. Il ruolo delle Regioni*, Padova 2012, p. 163 ff.

2.1 The Declared Goal: Regaining Autonomy and Promoting Integration of Asylum Seekers through an Holistic Approach to Reception

Accordingly, the Italian system of second reception is significant – from a comparative perspective – due to its nature and concrete substance.

On the one hand, the purpose is not merely to provide asylum seekers with first aid or minimal subsistence conditions, but to emancipating and allowing them to regain self-autonomy and independence. Reception must be accompanied with and functional to the integration of people participating to the SPRAR system in the local community in which they have been settled: in abstract terms, regaining autonomy and promoting integration of asylum seekers must be the final goal of the system.

This purpose goes to influence the concrete structure of the SPRAR system, in terms of involved level of government (local and regional bodies) and provided services. In terms of services, the system, to which as mentioned before local bodies can voluntarily decide to participate, is intended to offer not only minimum services but an integrated set of essential services, which are those typically related to the traditional functions of local entities (municipalities). According to the Guidelines provided in 2015 by the Italian Ministry of the Interior,¹⁹ services provided within the SPRAR system must cover the following areas: linguistic and intercultural mediation; guidance and access to territorial services; professional guidance and requalification; guidance to social, housing and job placement; legal aid; and socio-health protection.

This approach must lead to the establishment of a universal approach, intended to guarantee these services always and to all participants, within the common goal to regaining self-autonomy through the *empowerment* of beneficiaries, intended as the individual and organised process in which individuals can rebuild their ability to choose and planning and regain perception of their value, of their potential and opportunities.²⁰ Accordingly, reception is defined as *integrated*, in two dimensions: in the sense of the integration of first-aid services (board and lodging) with services aiming at favouring the acquisition of tools for autonomy; in the sense of the integration of services to asylum seekers within the SPRAR framework with the so-called 'local welfare', meaning that SPRAR must be intended as integral part of local welfare and complementary to the other public services provided to population at the local level.²¹

With regard to the conditions for being admitted to the SPRAR system, migrants that are in a situation of 'absence of sufficient resources to provide an adequate quality of life for him/herself and his/her family' must present a formal request on voluntary basis, which will be processed and evaluated by the compe-

¹⁹ Ministry of Interior, *Manuale operativo per l'attivazione e la gestione dei Servizi di accoglienza integrata in favore di richiedenti e titolari di protezione internazionale e umanitaria*, September 2015.

²⁰ *Ibid.*, p. 6.

²¹ *Ibid.*, p. 7.

tent Governmental bodies (*Prefettura*). It is possible to appeal before administrative judges against the decision of the competent authority.

According to the data provided by the Ministry of the Interior, the SPRAR system covers only a limited part of the effective request of reception of asylum seekers.²² Although from 2012 (3.000 places) the availability of places within the SPRAR system has constantly increased (around 40.000 places are expected in 2017), the vast majority of migrants that are entered in the procedure for seeking asylum or other form of protection (subsidiary or international) are hosted in Centres for Extraordinary Reception (CAS – 68.903 places according to the data provided by the Ministry), which the legislative decree defines as exceptional and temporary means for unforeseeable situations. Other, unreported numbers, part of migrants simply does not have access neither to SPRAR nor to CAS.

2.2 A Multilevel Structure: The Role of Planning and Coordination between Different Levels of Government

The second reception system, based on SPRAR framework, can be defined as multilevel, as a different level of government, as well as NGOs and private associations, are involved. Due to this structure, coordination and planning of action becomes crucial. An efficient mechanism of planning and coordination represents the precondition for the strengthening of an 'ordinary' approach to reception: to assess adequately ordinary reception, in order to face promptly 'extraordinary' reception needs and avoid the overlapping between ordinary and extraordinary reception.

Accordingly, the Government expressly recognised that the direct and active involvement of local entities must represent an integral part of the reception system, with regard also to the planning activity. Therefore, in general terms, the legislative decree goes to reinforce mechanisms of coordination between different levels of government, in order to manage situations of strong migratory pressure together with local entities.²³ In this regard, the Legislative decree n. 142/2015 provides for different mechanisms and sites for coordinating and controlling the activity performed at the territorial level within the SPRAR system.

Levels of coordination and planning are twofold: national and regional. On the one hand, at the national level the National Board of coordination (*Tavolo nazionale di coordinamento*) is entitled to provide for general guidelines and planning of actions, in order to optimise the reception system. Accordingly, it defines the criteria of regional distribution of places to be used for hosting asylum seekers and predisposes the Annual National Plan for Reception, which defines the expected amount of places on arrivals estimate basis.²⁴ In order to guarantee the effective participation of regional and local entities, the National

²² See the Italian Roadmap, 28 September 2015.

²³ Ministry of Interiors' Order, 30 October 2015.

²⁴ Legislative Decree n. 142/2015, art. 16.

Board is composed also by representatives of Regions and local entities (National Association of Municipalities-ANCI).

On the other hand, the decree provides for the establishment of Regional Boards of coordination (*Tavoli regionali di coordinamento*), which are called to implement the guidelines and plans approved at the national level. They must define criteria to individuate the structures for hosting migrants within the 'first reception' system and to allocate places in the framework of the 'second reception' (SPRAR) system. It must be underlined that the central role of local entities, not only in implementing but also in programming activities of reception, is in line with the principles of Directive 33/2013/EU. In its Recital 27, the Directive expressly states that 'appropriate coordination should be encouraged between the competent authorities as regards the reception of applicants, and harmonious relationships between local communities and accommodation centres should therefore be promoted'.

3. FROM EXTRAORDINARY TO ORDINARY (INTEGRATION-ORIENTED) RECEPTION: WHICH PRECONDITIONS FOR EFFECTIVENESS?

After having briefly described the Italian system of reception and hosting migrants and asylum seekers, focusing pros and cons, it is possible to conclude by proposing a set of conditions that can guarantee an effective, efficient and rights-oriented implementation of the system. While it expresses, especially when considering the second reception phase based on SPRAR, the determination to overcome an approach to migration based on emergency in favour of an ordinary and physiological response to this phenomenon, it presents some gaps and failures, which can in practice hinder its effective realization. Therefore, it seems advisable to focus on at least three preconditions for the effective and physiological implementation of the Italian reception system, effectively based on a holistic and universal approach to provided services, on the one hand, and to regaining autonomy and favouring integration of asylum seekers, on the other hand.

3.1 From Limited (Voluntary) to Uniform (Mandatory?) Participation

In order to effectively realise the idea to make SPRAR a constituent and integral part of the local welfare, intended as complementary to other public services provided by municipalities to its own community, it seems appropriate to extend the network of local entities which take part of the SPRAR system. This goal can be achieved both by the establishment of economic incentives, which make more sustainable the decision to participate to SPRAR, or by making the participation mandatory and not merely voluntary. Compulsory nature of participation to SPRAR may be accompanied by the increase in financial coverage guaranteed by the State and may favour the inversion of the current proportion between ordinary – SPRAR – and extraordinary – CAS – reception measures.

It must be underlined that the need to reinforce the ordinary mechanism of reception, instead of the extraordinary ones, has been formally declared by the Italian Government. In the allegations provided before the ECtHR,²⁵ the Italian Government expressly said that ‘the consolidation of the SPRAR, owing to the expansion of its capacity and the allocation of permanent resources, represents a fundamental step in reinforcing and ensuring a firm basis for the reception system, with a view to proceeding from an emergency situation to a situation of normal management’.

3.2 Adequate Financial Resources

In order to make the system both efficient and effective, State must guarantee to regional and local levels adequate institutional, human and financial resources. Actually, central government covers up to 80% of the costs of projects within SPRAR;²⁶ the public announcement (*bando*) SPRAR 2016-2017 recognises the need to reinforce the system and – accordingly – states that the National Fund will guarantee to local entities selected for participating to the system up to the 95% of the total costs of the actions.²⁷ A working document published by ASGI (Association on Legal Studies on Immigration – *Associazione Studi Giuridici Immigrazione*) proposed that the realisation and management at least of the minimum services which must be guaranteed on the whole national territory will be totally covered by the State.²⁸

Another possible virtuous effect of the growth of State’s funding could be the effective realisation of minimum standard of quality of services and aid provided within the reception mechanisms; it could also favour the homogenisation of services provided in different centres and local actions, which are actually very divergent in terms of quality.²⁹ This could contribute to overcoming the gaps identified by the European Court of Human Rights within the Italian reception system, in terms of risk for migrants to be exposed to inhuman and degrading treatment, due to the existence of ‘systemic deficiencies’ in the reception ar-

²⁵ See the decision *Mohammed Hussein and Others v. the Netherlands and Italy* (dec. n. 27725/10, § 45, 2 April 2013), recalled by the Court in the case *Tarakhel v. Switzerland*.

²⁶ See T. Caponio, ‘Governio locale e immigrazione in Italia tra servizi di welfare e politiche di sviluppo’, *Le Istituzioni del Federalismo*, n. 5, 2004, p. 808.

²⁷ Art. 19 of public announcement, August 2015. It must be underlined that the Government will publish a public announcement for funding regional initiatives on first and second reception of non-accompanied minors (€ 162.091.800,00).

²⁸ ASGI, *Prime note sul decreto legislativo 18 agosto 2015 n. 142, di attuazione della direttiva 2013/33/UE sulle norme relative all’accoglienza dei richiedenti protezione internazionale e della direttiva 2013/32/UE sulle procedure comuni ai fini del riconoscimento e della revoca dello status di protezione internazionale*, written by N. Morandi, G. Schiavone, P. Bonetti, 1 October 2015. See also the Opinion of the Senate’s Commission on Constitutional Affairs, July 2015.

²⁹ P. Mori, ‘Profili problematici dell’accoglienza dei richiedenti protezione internazionale in Italia’, *Il Diritto dell’Unione Europea*, n. 1, 2014, p. 127 ff.

rangements for asylum seekers in Italy.³⁰ The ECtHR focused particularly on the effective adequateness of the Italian system, underlying the limited number of places guaranteed within SPRAR: 'The data and information set out above nevertheless raise serious doubts as to the current capacities of the system. Accordingly, in the Court's view, the possibility that a significant number of asylum seekers may be left without accommodation or is accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions, cannot be dismissed as unfounded' (§ 115).³¹

3.3 To Clarify the Legal Nature of Hotspots

As stressed above, the legal basis and nature of hotspots need to be clarified by the Italian legislator. Apart from Decision 2015/1523 of the European Council (14 September 2015), no legal source – neither at the European nor at the national level – makes formal reference to those centres. Therefore, the nature – first reception or identification and expulsion centres – remains unclear: it leads, inevitably, to legal uncertainty with regard to the procedures and guarantees to be applied in the execution of procedures within the hotspots. In the light of an effective and guaranteed procedure for asylum, the required standard and rules must be provided – and possibly monitored and verified – as if the hotspot procedure will be the first phase of the asylum procedure, also in the light of the recent ECtHR case-law: the individual examination of requests; the right to be informed on the right to ask for protection; the principle of safe third country; the principle of *non-refoulement*; the right not to be subject to inhuman and degrading treatment; the right to an effective remedy, some NGOs underlined the lack of access to correct information and the lack of possibilities to speak with UNHCR officers in some cases during hotspots procedures.³²

4. THE ROADMAP IMPLEMENTATION AND THE RISKS OF VIOLATION OF THE RIGHT TO HAVE ACCESS TO THE ASYLUM PROCEDURE

The *Roadmap approach* divided forced migrants rescued – disembarked into two categories:

- those who are considered part of Category number one are conceived as asylum seekers and as a consequences they are within the scope of the Reception Conditions Directive;

³⁰ ECtHR, Grand Chamber, *Tarakhel v. Switzerland*, 14 November 2014.

³¹ On the relationship between State's funding and rights' protection within the reception system, see P. Bonetti, '*Sharifi c. Italia e Grecia e Tarakhel c. Svizzera*: sui diritti del richiedente asilo alla protezione e a un'assistenza dignitosa', *Quaderni costituzionali*, n. 1, 2015, p. 223.

³² See on this issue: <http://www.ecre.org/component/content/article/70-weekly-bulletin-articles/1210-hotspots-the-italian-example-conversation-with-christopher-hein-from-cir.html>.

- those who are from Nigeria, Gambia, Ivory Coast, Bangladesh are automatically excluded from the category of asylum seekers and they are placed on a different list called Category two.³³

This division between two categories starts from the arrival of the migrant in Italy.

People are divided after considerations and analysis done by Frontex and national police officers. These officers take into consideration first of all the nationality and they impose a limit to the access to seek asylum formally. Notwithstanding, as prescribed by the Italian national law, the only authorities in charged for deciding on an asylum request, also on accelerated procedure, are the competent bodies called 'Territorial Commission'.³⁴

There is a sort of implicitly first accelerated procedure based on analysis done by the police and Frontex officers, but this 'analysis' is not inside the Italian national asylum procedure, and there are references to Frontex officers in the EU Asylum procedures directive but as we know a new EU regulation should come into force to improve the Frontex role in the asylum procedure.³⁵ In particular the

³³ The Italian Roadmap 2015 Hotspots, readmissions, asylum procedures and the re-opening of detention centres at: <http://www.statewatch.org/news/2015/dec/no-279-Italian-Road-Map-2015.pdf>.

³⁴ As prescribed by Legislative decree 142/2015 and legislative decree 25/2008 that transposed the previous APD, the only authority competent on international protection determination are the Territorial Commission. 'Under Italian legislation, there is no admissibility/screening procedure or any border procedure. Under the previous law, in a number of circumstances prescribed by the Procedure Decree, asylum applications may be examined under the 'prioritised procedure', meaning that the regular procedure is shorter. The previous prioritised procedure applied when: (a) the request is deemed manifestly well-founded; (b) the asylum claim is lodged by an applicant considered vulnerable; (c) the asylum seeker is accommodated in CARA – except where accommodation is provided to verify the applicant's identity – or held in an Identification and Expulsion Centre - Administrative Detention Centres (*Centro di identificazione ed espulsione*) (CIE). By law, only for the cases held in CIE, the Territorial Commissions conducted the personal interview within 7 days from receipt of the relevant documentation from the Questura, and take the decision within the following 2 days. The Legislative Decree 142/2015 introduces an accelerated procedure in addition to the prioritized procedure. The President of the CTRPI identifies the cases under the prioritized or accelerated procedures. The prioritised procedure is applied when: (a) the request is deemed manifestly well-founded; (b) the asylum claim is lodged by an applicant considered vulnerable; (c) the applicant is placed in a CIE; and (d) the applicant comes from one of the countries identified by the CNDA at the scope to omit the personal interview', see at: <http://www.asylumineurope.org/reports/country/Italy/asylum-procedure/general/short-overview-asylum-procedure#sthash.imW7vuY5.dpuf>.

³⁵ There is any reference to Frontex in the Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection. As mentioned in the new European migration policy there are working to strength the role of Frontex in the asylum procedure, see among all : http://ec.europa.eu/priorities/migration_en, 4 April 2016.

Italian legislator never transposed the definition of safe third country and there is no list of safe third countries in the national asylum procedure. At this stage these national police officers are doing a distinction without any formal power prescribed to them within a legal procedure: they are in practice imposing upon certain nationality the impossibility to have access to the right to seek asylum and to be under the Reception Conditions Directive.

4.1 The Right to a Fair Asylum Procedure

In the European legal system, due to Article 41 of the Charter of Fundamental Rights, every person, not only every European citizen, has the right to have access to a *fair* administrative procedure. As a consequence all the administrative procedures connected to arrivals, identification, fingerprints procedure have to be conceived and put in places from the effective point of view as fair.³⁶ The right to have access to a fair administrative procedure concerns also those procedures inside and connected to the asylum request, that is an administrative procedure, but also to all those actions by public officers which have substantial consequences on peoples' rights. To impose limitation to the right to seek asylum depriving automatically some nationality, due to the lack of a formal decision and a procedure with specific rules, and to the right to have a written document against which to exercise the right to effective remedy, it is undoubtedly in contrast also with the right to a fair administrative procedure.³⁷

In the Italian reception system people qualified as 'international protection/asylum seekers', are those people who have expressed their *willingness* to seek asylum or, indeed, they have already formalized their application and are awaiting the administrative process conduct or judicial consequent to the asylum request. The main gap between the access to asylum reception and a fair asylum procedure is of course the concrete meaning of willingness to ask for asylum. As prescribed by the national and the European law the asylum request could be done also orally.³⁸ There is no obligation for the asylum seekers to ask for asylum in written form, but as a consequence of their right to have access to an effective remedy each person put into one category or another should have the evidence: a document, a written paper that prescribes in fact and law why this decision has been taken and how he/she can appeal against this decision exercising their right to an effective remedy.³⁹

³⁶ The right to a fair and good administrative procedure in the CFR is provided by Article 41 ('Right to good administration'): 'Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.'

³⁷ M. Reneman, 'EU Asylum Procedures and the Right to an Effective Remedy', *Int J Refugee Law* (2015) 27 (4), p. 701-703, doi:10.1093/ijrl/eev057.

³⁸ As prescribed by article 3 of the presidential decree number 21 of 5 March 2015 giving fully implementation to Legislative Decree 25 of 18 of January 2008, the first APD implementation into the Italian Legal System.

³⁹ See on the compulsory obligation to respect the right to have access to an effective remedy: UNHCR ExCom, Conclusion No. 8 (XXVIII), 1977, para. (vi) 'If the applicant is not rec-

Without correct information at the arrival at the different borders (sea borders, airport borders, any kind of borders) a person has no possibility to understand how and when he/she has to exercise his/her right to seek asylum.

The absence of information guarantee to all migrants could violates Articles 6 and 8 of the Asylum Procedures Directive: asylum seekers of those countries automatically considered as *Category two* (not asylum seekers) could not effectively understand that they have to submit immediately their request, their willingness to ask for asylum; or that they have the right to ask for a written document/paper in where there should be clear information and a decision in order to exercise their right to have access to an effective remedy.⁴⁰

From July 2015, due to the number of people denied in their right to seek asylum because of their nationality there are many persons that have been put in a condition of potential *refoulement* such as some trafficked Nigerian female who were victims of trafficking and had decided not to be slaves any longer.

To assure the respect of right to information the Italian Minister of Interior Department, also thanks to NGOs and UNHCR advocacy, invited police officers to respect effectively the right to correct information to all asylum seekers as prescribed by Article 8 of Asylum Procedures Directive.⁴¹ The mentioned Circular of the Minister of Interior recalls the ordinance of the Italian Court of Cassation, 25 March 2015, No. 5926:

'the nothingness of the decrees of refoulement and administrative detention when information and correct translation have been missed and, as a consequence, the person had been denied in his/her right to seek asylum because she/he has not had any possibilities to formalize the request due to the lack of correct comprehension of his/her rights' .⁴²

ognized, he should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial, according to the prevailing system.' at: <http://www.unhcr.org/refworld/docid/3ae68c6e4.html>.

⁴⁰ The right to an effective remedy as prescribed by article 47 of the CFR should be considered inviolable also in case of accelerated procedure. In fact putting immediately Bangladesh people inside category two could be without a case by case analysis a violation of non refoulement principle. As we know from Bangladesh there could be Bihari people, these person could be refugees, see among all: Minority Rights Group International, *Bangladesh's Bihari minority – Urdu-speaking Muslims who migrated from Bihar and West Bengal during India's partition – have long been discriminated against for their perceived alliance with Pakistan during the independence war. Many lack formal citizenship and are therefore stateless*, Bangladesh: State of the World's Minorities and Indigenous Peoples 2015, 2 July 2015, available at: <http://www.refworld.org/docid/55a4fa67c.html>.

⁴¹ http://www.asgi.it/wpcontent/uploads/2016/01/2016_Ministero_Interno_accesso_asilo_garanzie_modalita.pdf.

⁴² See for a complete analysis of all the MOI circulars on this issue: 'Diritti e frontiere' Fulvio Vassallo Paleologo, <http://dirittiefrontiere.blogspot.it/2016/01/il-ministero-dellinterno-interviene-con.html>.

5. CONCLUSION

The Italian reception system is facing an extraordinary influx of migrants.⁴³

It inevitably provokes a strong pressure on the system, especially when the main goal is to turn the extraordinary mechanisms of reception into an ordinary system, based on a set of principles, which are formally declared at the legislative level (Legislative decree n. 142/2015 and Ministry's Orders): planning and coordination of action between different institutional subjects; universality of services provided (duty to guarantee to everyone minimum common services); autonomy and integration of asylum seekers (minimum assistance combined with services for facilitating autonomy) and complementariness of services with the ones traditionally provided at the local level (part of local welfare).

The focus on the 'hotspots approach', based on the establishment of centres equipped to temporarily host and identify migrants, and on its legal deficiencies in terms of both legal basis and effective implementation, represents a decisive perspective in order to effectively understand the Italian reception system in its concrete implementation.

Due, as already stressed, to a lack of legal ground on which those centres have been established – the European Agenda on Migration⁴⁴ and the Italian Road Map of the Ministry of Interior⁴⁵ cannot be considered an adequate legal source able to legitimate its establishment, due to their non-binding and 'soft' nature – it is very difficult, legally speaking, to concretely define the nature of this procedure. In this phase, activities of both first aid and healthcare providing – on the one hand – and procedures related to identification and qualification/registration of migrants – on the other hand – occur. Therefore, one could ask himself what is the effective nature of this procedure: Does it represent the first stage of the reception system, as it seems to focus on the provided medical screening? Or, conversely, does it convert itself in the first phase of the return procedure, as pre-identification concretely turns itself in the qualification process between asylum seekers and economic (irregular) migrants?⁴⁶

⁴³ See to have access to update data on mixed fluxes of arrivals by sea and by land through Greece and the Balkans to Italy and South Europe: http://data.unhcr.org/mediterranean/regional.html#_ga=1.113512206.806316504.1410294083.

⁴⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A European Agenda on Migration*, COM(2015) 240 final, 13 May, 2015.

⁴⁵ Ministry of Interior, *Italian Roadmap*, 28 September 2015.

⁴⁶ On the issue, among others, G. Campesi, 'Chiedere asilo in tempo di crisi. Accoglienza, confinamento e detenzione ai margini d'Europa', in: C. Marchetti & B. Pinelli (eds), *Confini d'Europa. Modelli di controllo e inclusion informali* (provisional title), forthcoming, Cortina/Milano 2016; M. Pichou, 'Reception or Detention Centres? The detention of migrants and the new EU "Hotspot" Approach in the light of the European Convention on Human Rights (February 10, 2016)', *Critical Quarterly for Legislation and Law* (Nomos), forthcoming. Available at SSRN: <http://ssrn.com/abstract=2730654>; G. Cornelisse, 'Territory, Procedures and Rights: Border Procedures in European Asylum Law', *Refugee Survey Quar-*

The legally uncertain nature of the hotspots has been recently stressed by the 2016 Report on CIE (Centres of Identification and Expulsion) published by the Extraordinary Commission on Human Rights established by the Italian Senate. In its Report, the Commission states that it remains to define the legal nature of centres in which the 'hotspots approach' is implemented, as it is unclear whether they continue to be first reception centres or have become centres of identification and expulsion.⁴⁷

Overcoming the doubts related to the legal nature – the legal qualification and its legal grounds – of the hotspots is not a purely formal issue: as already stressed, the pre-identification procedure – considering also the lack of effective guarantees during this phase also stressed by the Extraordinary Commission on Human Rights in its Report – can become decisive in attributing to migrants the status of asylum seekers, meaning that they will have access to the reception system, or – conversely – the status of economic migrants, which automatically turn them in irregular migrants to be returned and expelled.

The decision to put in action an accelerated procedure to face the increase of influxes could not be a tolerated and legalized implicit violation of the principle of *non-refoulement*.

In case of accelerated procedure based on nationality conceived as safe third country the procedural guarantees such as the access to the asylum request and the effective remedy should be respected as the *effective habeas corpus* of the *non-refoulement* principle.⁴⁸

terly, 35, 2016, p. 74-90; C. Costello & M. Mouzourakis, 'EU Law and the Detainability of Asylum-Seekers', *Refugee Survey Quarterly*, 35, 2016, p. 64.

⁴⁷ Extraordinary Commission on Human Rights, *Report on CIE*, Senate of the Republic 2016, p. 23.

⁴⁸ See on this issue: Parliamentary Assembly of the Council of Europe Resolution on accelerated asylum procedures, which states that Member States should ensure a balance between the need to process asylum applications in a rapid and efficient manner and the need to ensure there is no compromise over international obligations including under the Refugee Convention and the ECHR. Council of Europe: Parliamentary Assembly, Resolution 1471 (2005) on Accelerated Asylum Procedures in Council of Europe Member States, para. 8.1.17 October 2005, 1471 (2005), at: <http://www.unhcr.org/refworld/docid/43f349e04.html>.

8. Reception Conditions and the Status of Transposition of the Reception Conditions Directive (recast) in Greece

Vassilis Avdis*

1. BACKGROUND

Over the past years the Greek asylum system, particularly concerning reception conditions for asylum seekers, is constantly being subjected to strong criticism¹ and Greece has been repeatedly condemned for failure to provide adequate reception conditions and acceptable detention conditions. The European Commission has commenced infringement proceedings and sent a Letter of Formal Notice to Greece on 2 November 2009. Under both international and internal pressure, Greece adopted an Action Plan for Migration in August 2010,² under which the Greek government committed to

‘create first reception and screening centers, to restructure entirely its asylum system, to introduce special procedures and support for vulnerable groups, to build new detention and pre – removal centers and to increase the efficiency of returns of irregular migrants to their countries of origin.’

The most important subsequent step taken by the Greek State was the adoption of law 3907/2011,³ which, on the one hand, created the Asylum Service and the Appeals Authority, two public services, independent of the Police, competent for the examination of claims for international protection on first and second instance respectively, and, on the other hand, created the ‘First Reception’ Service. This Service has as its objective to effectively manage irregularly entering third country nationals, to perform their identification and nationality screening, registration, medical examination, to provide them with information, to identify vulnerable persons, and then channel asylum seekers to the asylum procedure while channeling the rest to return/deportation procedures. While the law brought significant changes and obvious improvement to the legal framework

* The opinions expressed in the present article are not necessarily shared by UNHCR.

¹ See, for example, UN High Commissioner for Refugees (UNHCR), *Observations on Greece as a country of asylum*, December 2009, available at: <http://www.refworld.org/docid/4b4b3fc82.html>; Human Rights Watch, *Greece/Turkey, Stuck in a Revolving Door – Iraqis and Other Asylum Seekers and Migrants at the Greece/Turkey Entrance to the European Union*, New York: Human Rights Watch 2008.

² Press Release available at: www.yptp.gr/index.php?option=ozo_content&perform=view&id=3246&Itemid=443&lang=EN.

³ *Official Gazette of the Hellenic Republic A 7/26.1.2011*

concerning the asylum procedure and the initial reception of third country nationals entering Greece irregularly, the legal framework concerning the reception of applicants for international protection was not amended, and continued to be governed by Presidential Decree 220/2007⁴ which transposed the Reception Conditions Directive.

Therefore, different standards and different legal provisions apply concerning reception in Greece, as we have to differentiate between 'first reception' and the reception of applicants for international protection, which can be referred to as 'second line' reception. 'First Reception' is governed mainly by law 3907, and concerns all persons entering irregularly in Greece, until they submit an asylum claim or until they are channeled to return/deportation procedures, if they do not apply for asylum. 'Second line' reception is governed mainly by Presidential Decree 220/2007 and concerns the reception conditions for applicants for international protection. While the analysis and assessment of 'first reception' procedures fall outside the scope of this chapter, it has to be noted that the system of 'first reception' did not work successfully in practice, as a wide range of deficiencies led the First Reception Service not to be able to operate in an acceptable scale and cover, if not all, at least, an important number of persons entering the Greek territory. During its almost four years of operation, only a small percentage of these persons went through 'First Reception Procedures' while the overwhelming majority is still registered by the Police.⁵

In 2015, mainly the aggravation of the conflict in Syria, the lack of prospect of return for refugees already present in neighbouring countries, and a series of other factors, led to a huge rise of arrivals of third country nationals to Greece. The number of arrivals reached 856.723 by the end of 2015. Arrivals continue in the same rate in 2016, exceeding 76.000 in mid February.⁶ The number of arrivals in 2014 was 43.518,⁷ thus the increase in 2015 is of almost 2000%. According to UNHCR data, more than 90% of people arriving have a refugee profile, as their countries of origin are the world's top refugee-producing countries, such as Syria, Afghanistan, Iraq, Eritrea or Somalia.⁸ The numbers indicate⁹ that the majority of people arriving in Greece continue their journey through the 'Balkan route' to western Europe. Greece and the rest of the European Union were unprepared to react timely to this increase of numbers.

In September 2015, with EU Council Decisions 1523 (14/9/2015) and 1601 (22/9/2015), a relocation scheme was introduced to support Italy (which is in a

⁴ *Official Gazette of the Hellenic Republic* B 251/13.11.2007

⁵ See UNHCR, Greece as a Country of Asylum 2014, *supra* n.1, p. 9, where it is noted that from January to September 2014, only 20% of arrivals went through First Reception Services. It is obvious that the respective percentage is considerably lower in 2015 as arrivals have risen dramatically.

⁶ <http://data.unhcr.org/mediterranean/country.php?id=83>.

⁷ Statistics by the Hellenic police available at: http://www.astynomia.gr/images/stories//2014/statistics14/allod2014/statistics_all_2014_et.JPG.

⁸ <http://data.unhcr.org/mediterranean/country.php?id=83>.

⁹ <http://data.unhcr.org/mediterranean/country.php?id=502>.

similar situation with 153.842 arrivals in 2015) and Greece. Under this scheme 66.400 asylum seekers are to be transferred from Greece in the course of two years. Candidates for relocation are applicants for international protection belonging to a nationality for which the proportion of decisions granting international protection among decisions taken at first instance in the EU on applications for international protection is 75 % or higher.

While arrivals continue in high numbers and the relocation program, as it will be seen below, produces little results so far, Greece, being in deep economic crisis since 2010, is trying to cope with its commitments and obligations concerning reception conditions.

2. RECEPTION CONDITIONS

As it has been noted above, Greece transposed in its national legislation the original Reception Conditions Directive (2003/9/EC) with Presidential Decree 220/2007. The Decree entered into force in November 2007, with a significant delay, as the Directive had to be transposed in February 2005.

While Presidential Decree 220/2007 regulates most issues covered by the original Reception Conditions Directive, two very important topics are regulated by different legislative texts: detention of asylum seekers and access to employment and vocational training. Detention is regulated with the Presidential Decree 113/2013, governing the asylum procedure (and transposing the Asylum Procedures Directive), while employment rights of applicants for international protection, are today regulated by the, largely outdated, Presidential Decree 189/1998. Both these texts are subject to imminent amendment, in order to be in line with the recast Reception Conditions Directive, while the rest of the provisions of the Directive will hopefully be transposed in the following months.

Before examining these draft provisions of the new legislation transposing the recast Reception Conditions Directive, some issues concerning the implementation of the original Directive will be mentioned.

a. The Original Reception Conditions Directive

The implementation of reception conditions in Greece proved to be the area where the Greek State confronted most difficulties, in the context of the Common European Asylum System. More specifically Greece faced significant problems in 4 major areas:

i. Detention conditions. Although the original Reception Conditions Directive says little about conditions of detention of applicants for international protection, the issue is closely related to reception conditions. This area proved to be the most problematic and Greece is repeatedly convicted as detention conditions for asylum seekers were found to be in violation of the European Convention for Human Rights. More specifically, the Greek detention centres were found to be overcrowded, with no or extremely limited sanitary facilities, no possibility of recreation. In parallel, detention in certain cases exceeded 18

months,¹⁰ in breach of European legislation. There was no use at all of alternatives to detention, unaccompanied minors were detained (until a reception facility is found, but this could take months), there was detention of men along with women and children. As a result Greece repeatedly condemned for poor detention conditions,¹¹ while ECtHR's decision in *MSS v. Belgium and Greece*, along with CJEU decisions in joint cases *N.S. (C-411/10)* and *M.E. (C-493/10) v. Secretary of State for the Home Department*, signified the suspension of Dublin Regulation transfers to Greece.

Since the beginning of 2015, detention conditions are vastly ameliorated, the main reason for that being the change of policy by the new government, resulting to a large percentage of persons under immigration detention and asylum seekers under detention being released. Thus, only a small number of applicants is today detained, mainly for reasons of public order. In 2013 there were 2.555 applicants for international protection that were detained, in 2014 there were 1.645 and in 2015 there were 1.018,¹² while the number was probably much lower at the end of the year. Although it seems that this situation is slightly reversed, the diminishment of the number of detainees, clearly contributes to the amelioration of detention conditions, as overcrowding was the main reason affecting these conditions. It is obvious that if that policy changes and there are again high numbers of detainees, detention conditions will deteriorate, as there are no data signifying that the detention centres are ameliorated or that their capacity is increased.

ii. Housing and material reception conditions. Until today the majority of reception facilities are not state-run. The State only has a role of supervision and coordination. Despite the efforts by Greek NGOs operating the existing reception facilities for asylum seekers, the number of places in these installations is far lower than the number of asylum seekers and, consequently, of potential demand. In October 2014, the number of places in reception facilities and apartments was 1.063. To this number 320 places for unaccompanied minors was included. The Greek Government had committed to increase the number of reception places by 1.500 places to reach a total of 2.500 places by the end of

¹⁰ See UN High Commissioner for Refugees (UNHCR), *UNHCR observations on the current asylum system in Greece*, December 2014, available at: <http://www.refworld.org/docid/54cb3af34.html>, p. 28; for conditions of detention, see also European Council on Refugees and Exiles, *Asylum Information Database, AIDA National Country Report: Greece*, November 2015, available at: <http://www.refworld.org/docid/56652de84.html>, p. 99.

¹¹ See, *MSS v. Greece* (Application no. 30696/09) where the ECtHR dealt with the issue of access to the asylum procedure in the country, to find that living conditions, combined with the prolonged uncertainty and also the deficiencies in the Greek authorities' examination of the applicant's asylum request and the risk s/he faces of being returned directly or indirectly to his country of origin without any serious examination of the merits of his asylum application and without having access to an effective remedy constituted a breach of article 3 ECHR. See also ECtHR case *Tabesh v. Greece*, case no 8256/07, and recent ECtHR case *F.H. v Greece*, 78456/11, also recent case *H.A. v. Greece*, 58424/11.

¹² AIDA report, *supra* n. 11, p. 8.

2014 but this target was not reached¹³ and the commitment was repeated by the Government in August 2015. In November 2015 there were 1.271 places in reception facilities all over Greece, while there were 13.197 asylum claims registered in 2015 by the Asylum Service.¹⁴

Nonetheless, according to the latest statistics provided by the National Centre of Social Solidarity, the state body responsible for the allocation of beneficiaries to the facilities, curiously almost all requests for housing are satisfied.¹⁵ This suggests that most asylums seekers prefer to find their own accommodation and/or that they do not stay for long periods in the reception facilities. This is linked to the fact that a significant number of the facilities are in remote locations in relation to Athens where most asylum seekers prefer to stay, to the fact that some accommodation offered is not appropriate and, of course, to the fact that a significant number of asylum seekers do not stay for long in Greece.

Moreover, concerning other material reception conditions, it has to be noted that a financial allowance to asylum seekers is provided only on a random and exceptional basis, while being very low, and that there is no other form of aid (vouchers etc.).¹⁶

iii. Guardianship for unaccompanied minors. This is an area where the Greek State fails tragically for years. While in law the guardianship system is provided, in practice it is almost totally non-existent, leaving almost all unaccompanied asylum seeking children totally exposed. According to Presidential Decrees 220/2007 and 113/2013, the local Prosecutor for minors is automatically appointed as the guardian of the unaccompanied minor seeking asylum. He has to represent the child and safeguard his/hers best interest. The Prosecutor can appoint a representative to perform specific tasks (represent the minor in the asylum procedure, or during an age assessment procedure etc.). In practice unfortunately, the Prosecutor, mainly because of excessive workload,¹⁷ is unable to exercise his duties and only in seldom occasions he appoints a representative (usually an NGO lawyer). To the above, the absence of a reliable and uniform system for the age assessment of minors must be added which leads to a significant number of minors to be treated as adults, as either no age assessment is realized or, if it is realized, this is not done according to international standards and thus results are not accurate. As a result, in the majority of cases, the minor, if identified, and if he/she applies for asylum, is not represented through the whole asylum procedure.

¹³ UNHCR, Greece as a country of asylum, *supra* n. 11, p. 19, AIDA report, *supra* n. 11, p. 75.

¹⁴ http://asylo.gov.gr/wp-content/uploads/2016/01/Greek-Asylum-Service-statistical-data-2015_gr.pdf.

¹⁵ http://www.ekka.org.gr/portal_docs/news/361.pdf.

¹⁶ AIDA report, *supra* n. 11, p. 77.

¹⁷ The Prosecutor for minors is also competent for a variety of other tasks including delinquency of minors, crimes with minors as victims etc. The small number of Prosecutors make it impossible for them to exercise their duties as guardians for unaccompanied minors. For example for Athens, there are only two Prosecutors for minors.

iv. Access to employment. The law (Presidential Decree 189/1998) provides for access to the labor market for asylum seekers, who are, upon request, provided with a work permit. Nevertheless, the work permit is given only after a '*research of the labor market, and only in case there is no interest expressed by a Greek national, an EU citizen, a third country national of Greek origin or a recognized refugee*'. These conditions make access to employment very difficult and lead a great number of asylum seekers either to unemployment or to seek illegal employment, exposing themselves to all forms of exploitation. To the above, the 25% unemployment rate¹⁸ in the context of the economic crisis in Greece, must be added, to conclude that asylum seekers' access to the labor market is extremely difficult.

b. Transposition of the Reception Conditions Directive (recast)

To date, the Reception Conditions Directive (recast) has not been transposed into national legislation. The Government has prepared a draft law, made public at the end of December 2015, which transposes the provisions of the Directive concerning detention. More specifically, with the new proposed legislation, Articles 8 to 11 of the Directive will be transposed in the same legislative text with provisions regulating the asylum procedure and transposing the Asylum Procedures Directive (recast).

New provisions, according to the draft law, are reforming and ameliorating significantly the legal framework on detention of applicants for international protection. More specifically the most important changes concern detention grounds, length of detention, review of the detention decision and detention of unaccompanied minors.

i. Detention grounds. Five out of six grounds for detention as provided in the Directive are to be transposed. More specifically, an applicant can be detained for: verification of identity or nationality (Art. 8 par. 3 (a) of the Directive), in order for the authorities to determine elements important for the asylum procedure (Art. 8 par. 3 (b) of the Directive), if there are reasonable grounds to believe that the applicant is making the application in order to delay or frustrate the enforcement of a return decision (Art. 8 par. 3 (d) of the Directive), for reasons of public order or national security (Art. 8 par. 3 (e) of the Directive) and if there is a risk of abscondance under the Dublin Regulation (Art. 8 par. 3 (f) of the Directive).

Article 8 par. 3 (c) of the Directive allowing detention in order to decide on the applicant's right to enter the territory is not being transposed, according to the draft legislation.

ii. Length of detention. The draft legislation constitutes a significant improvement concerning duration of detention. It reduces the duration of deten-

¹⁸ http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=tsd_ec450&plugin=1.

tion to 45 days, with a possibility of an extension for another 45 days, while legislation in force allows detention of asylum seekers for 18 months.¹⁹

iii. Ex officio review of legality of the detention decision is introduced with the new legislation. The extension decision is also the object of an *ex officio* review, while the possibility for the detainee to ask for the review of the detention decision is maintained and the framework is improved with the possibility for the detainee to ask for free legal aid, although it remains questionable how and if the legal aid system will work in practice.

iv. Detention of unaccompanied minors is maintained with the new legislation, but a maximum duration of 25 days is provided, with the possibility of extension for another 20 days. Detention in the new legislation is allowed only as a measure of last resort and only until proper housing is found for the minor.

Concerning the remaining provisions of the Reception Conditions Directive (Recast) they will be probably transposed with a different normative text and probably in the following months. It is also probable that provisions regarding guardianship of unaccompanied minors and provisions regarding employment rights and vocational training will be part of different legal texts also adopted in the following period.

3. RECENT DEVELOPMENTS AND CHALLENGES

As it was stressed above, the Greek State was unable to implement in practice the original Reception Conditions Directive, in many important aspects of it. In the context as described above, in circumstances of both an economic and a refugee crisis, it remains to be seen if Greece will manage in the near future to satisfy the requirements regarding reception conditions under the recast Reception Conditions Directive.

In the summer of 2015, the Greek government, under pressure from the EU and EU Member States, following the European Leaders' Summit of 25 October 2015, committed itself to increase reception capacity to 30.000 places by the end of 2015, and to provide rent subsidies and host family programmes for at least 20.000 more persons with the support of UNHCR. These 50.000 places are intended to cover the reception needs of applicants for international protection, including relocation candidates, but also the needs for people entering irregularly in Greece, until they are channeled to return/deportation procedures and the return is realized.

At the end of September 2015 the Commission has sent a supplementary Letter of Formal Notice to Greece. In this second letter the Commission observed serious deficiencies in the Greek asylum system, concerning material reception conditions and particularly reception of those with special reception needs and vulnerable persons, structural flaws in the functioning of the guardianship system or legal representation. The Commission notes that progress has been made, but there is still a structural and persistent lack of reception capac-

¹⁹ See *supra* par. 2 (a) (i).

ity, independent of the large and unexpected influxes which have recently been observed.²⁰

In parallel, the relocation program which was set up with an ambition to relocate 66,400 persons in the course of two years has produced little result so far. Until the 7 February 2016, only 212 relocations have been realized, while 631 are pending for either acceptance by other Member States or realization.²¹ While the implementation of the relocation scheme constitutes another big challenge both to what concerns reception (for the period of time persons to be relocated will remain in Greece) and to what concerns registration of the asylum claims and the realization of relocations, the results of the procedure remain so low that one cannot be optimistic. The Commission, on the 10th February 2016,²² observes that

'The relocation of 66,400 people in need of international protection from Greece, as agreed by the Member States, has started very slowly with only 218 relocations so far. Only 15 Member States have offered places to Greece for relocations, providing for 1081 places, while 16 Member States have appointed Liaison Officers to support the process on the ground.'

The fact that there are only 1081 offered places by only 15 Member States, clearly shows that a relocation system cannot be based on a voluntary basis, if we want it to produce serious results and succeed to relocate significant numbers of persons. Otherwise, as the President of the Commission rightly put it 'if we continue at that rate, we will be there by 2101.'²³

In the same report the Commission observes, regarding reception places in Greece that

'Under this scheme, there are now 14,950 places available. In addition to the 7,181 places that are currently available in temporary and longer-term facilities at the Eastern Aegean islands, Greece has 10,447 places on the mainland. Therefore, the total number of existing reception places in Greece at the moment is 17,628. However, there is still a shortfall of 12 342 places compared to the 50,000 places to which Greece committed in October 2015.'

The Commission concludes that

²⁰ See Commissions Press release, available at: http://europa.eu/rapid/press-release_IP-15-5699_en.htm.

²¹ Asylum Service statistics, available at: http://asylo.gov.gr/wp-content/uploads/2016/02/Relocation-procedures-up-to-7.2.16_gr.pdf.

²² *Implementing the European Agenda on Migration: Commission reports on progress in Greece, Italy and the Western Balkans*, press release available at: http://europa.eu/rapid/press-release_IP-16-269_en.htm.

²³ <http://www.wort.lu/en/politics/eu-migrant-crisis-juncker-slams-pace-of-refugee-relocation-5645c0760da165c55dc4d177>.

'since the beginning of 2015, Greece has carried out 16,131 forced returns and 3,460 assisted voluntary returns of economic migrants who had no right to asylum in Europe. This remains insufficient in the context of over 800,000 arrivals in 2015.'

On the same date (10 February 2016) the Commission issued a recommendation addressed to Greece *'on the urgent measures to be taken by Greece in view of the resumption of transfers under Regulation (EU) No 604/2013 of the European Parliament and of the Council'*.²⁴

In the recommendation, the Commission points out the relation of the creation of the 50.000 reception places, along with the realization of the relocation program and the operation of the 'hotspots' to the re-initiation of the Dublin returns to Greece.

Yet, as it was stressed above, in 2015 alone, more than 830 thousand persons arrived in Greece while numbers continue to rise in 2016, as *'more than 80,000 refugees and migrants arrived in Europe by boat during the first six weeks of 2016, more than in the first four months of 2015'*.²⁵

Therefore, it is more than clear that, even if Greece manages to fulfil all its commitments and creates 50.000 places in the following two or three months, this will not be enough to provide reception conditions to nearly a million persons that will either be present or arrive on Greek soil or be returned through the Dublin Regulation (if returns are to be re-initiated as the Commission envisages), and that is even if the relocation scheme works also perfectly, and 66.400 persons are relocated in the following one and a half year.

Furthermore, the fact that only around 1% of persons arriving in Greece apply for international protection is another decisive factor that greatly affects reception. This will dramatically change if an important percentage of people arriving in Greece lodges an asylum application. No reception system will then be able to cope with these numbers and the Greek Asylum Service will not be able to register and process the claims.

It is evident that the promoted solution which involves the 'hotspot approach', the increase of reception places in Greece, the re-initiation of Dublin transfers and the tight control of the external borders of EU will not work, at least not in its own. It is also evident that a dramatic increase of returns, as this is suggested, is not possible, for various reasons but mainly because data suggest that almost 90% of people arriving in Greece come from refugee producing countries and thus there is no, at least legitimate and in respect of international law, way for Greece to realize high numbers of returns.

²⁴ Commission Recommendation (EU) 2016/193 of 10 February 2016 addressed to the Hellenic Republic on the urgent measures to be taken by Greece in view of the resumption of transfers under Regulation (EU) No 604/2013 of the European Parliament and of the Council, OJ L 38, 13.2.2016, p. 9–13, available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2016.038.01.0009.01.ENG&toc=OJ:L:2016:038:FULL.

²⁵ See *UNHCR News Stories*, 12 February 2016, 'Some 80,000 refugees arrive in Europe in first six weeks of 2016', available at: <http://www.unhcr.org/56bdf26.html>.

It is more than obvious that all efforts of the EU must concentrate on burden sharing and on the allocation of people arriving to all Member States. The study of the ways to do it falls outside the scope of this article, but it can be mentioned that such a system should be based on the drastic amendment of the Dublin System to include a system of fair allocation of persons arriving in the EU which should be obligatory for all Member States and based on objective criteria like population size, economic indicators and factors, unemployment rate etc. EU's reaction should also include a *prima facie* recognition system and a permanent resettlement mechanism, so that important numbers of persons are resettled directly from their countries of origin or third countries. Furthermore, and mostly, it should include the creation of legal avenues to the EU, in order to avoid to have more people perishing in their effort to reach safety, as happened to the 554 persons that are dead and missing in the Greek seas in 2015 and in the first one and a half months of 2016. What a proposed solution should not include is deterrent methods, methods to discourage persons wishing to apply for asylum and seek refuge in the EU as this is contrary to the Member States' commitments under international law and the principles that the EU claims to be built on.

9. The Reception Conditions Directive for Asylum Seekers in Germany: An Ambivalent Approach

Maximilian Pichl

1. INTRODUCTION

The Reception Conditions Directive and the Procedure Directive are not implemented in German asylum law and the actual government is not willing to change regulations from which refugees could benefit. During the negotiations the government was trying to Europeanize regulations from the German asylum system as no fundamental change in German reception structures was desired. But indeed, for German context the implementation is crucial, especially for the social benefits of asylum seekers during their long proceedings. For many asylum seekers reception is the normal situation as the average length of asylum procedures lasts for six to seven months. Asylum seekers from Afghanistan, Iraq or Somalia have to wait more than a year or several years to get their asylum claim granted and a residence permit.

My cursory description will focus in which ways the Reception Conditions Directive could change German asylum law.¹ I want to propose a strategic approach towards the directive, which means to handle European Law as a tool to overcome problematic national regulations. I will first discuss the political context of the implementation process (2.) and then switch to a more detailed look on some legal aspects: detention of refugees (3.1), social benefits (3.2) and access to medical treatment (3.3).

2. THE POLITICAL CONTEXT OF THE RECEPTION CONDITIONS DIRECTIVE IN GERMANY

The recent debates about the European Asylum law are a bit surprising: During the 'long summer of migration' in 2015,² almost every political actor was proposing that the European Union would need harmonized standards in the reception of asylum seekers. But these actors totally ignore – or at least: they intentionally ignore – the European Asylum directives for asylum procedures and reception, already adopted by the EU and waiting for their implementation in national law. The lack of implementation is one of the main problems for the effectiveness of the European Asylum System according to the Commission. But this problem

¹ For further information: M. Pelzer & M. Pichl, 'Die Geltung der EU-Aufnahme- und Asylverfahrensrichtlinien', *Asylmagazin* 10/2015, pp. 331 – 338.

² B. Kasperek & M. Speer, 'Of Hope. Hungary and the long summer of migration', *bordermonitoring.eu*, 9.9.2015, <http://bordermonitoring.eu/ungarn/2015/09/of-hope-en/>.

has existed since the beginning of the reform processes in the early 2000's. To push things forward, it is important to stress that the lack of implementation is directly linked to the assumption that a unified European Asylum System could be built solely upon market integration and law reforms. In contrast, migration policies are directly linked to anti-discrimination policies and a common social welfare system in the EU. To combine the reception of refugees and the social struggles for better living conditions for every citizen and migrant is crucial to deal with the ongoing historical processes.

Germany is one of the last states in the EU which is accepting the entrance of refugees without permanent border controls³ – an ironic situation, considering that the German Ministry of Interior is one of the main constructors of the EU border regime. But even in a state like Germany with a long tradition of immigration and an established asylum system, the reception of asylum seekers is not working nationwide. The German capital of Berlin, one of the world's most interesting places for young people, is the worst place for refugees. The New York Times published the reception process at the registration center in Berlin:⁴

'In a country known for efficiency, the experience at the State Office for Health and Social Affairs, known by its German acronym, Lageso, can be startling. Many migrants risked their lives to get here, only to find themselves waiting behind metal barriers in a dirt courtyard just to pull a number for the next line. The scene has ranged from chaotic to downright dangerous. On a recent morning, two hours before the center opened, an ambulance wound its way through dozens of migrants huddled under blankets. A man had collapsed – it was unclear whether it was from the cold or from exhaustion.'

One of the volunteers for refugees at the registration center told the newspaper *'this is not a refugee crisis, this is an administration crisis'*. The framing of the problem by the volunteer is absolutely right. The so-called 'refugee crisis' is a problem of distribution, caused by neoliberal political decisions, which demanded tax cuts, privatization of social housing and the reducing of personnel in administration. The cause of the registration problem in detail has two additional reasons: Firstly German authorities were relying on the border regime, assuming that Germany will not have to deal with a lot of asylum seekers. So in the past the reception infrastructures were reduced. Secondly Germany is unwilling to implement the standards for reception, originating in EU law.

At the time of writing this article, the recast Reception Conditions Directive is not implemented in German national law. The Commission initiated an infringement proceeding in August 2015 after the deadline for implementation was passed in July. The government wanted to implement the directive in an early

³ Because of actual dynamic political situations, this statement is only a snapshot and could be outdated at the time of publication.

⁴ M. Eddy & K. Johannsen, 'Migrants Arriving in Germany Face a Chaotic Reception in Berlin', *New York Times*, 26.11.2015, http://www.nytimes.com/2015/11/27/world/europe/germany-berlin-migrants-refugees.html?_r=1.

draft of the latest asylum law package from October 2015. But conflicts between the Conservatives and the Social Democrats escalated and the implementation process was stopped. The Social Democrats wanted to implement the screening of vulnerable groups and their correlating rights, however many other aspects of the directive were left out. In contrast the Conservatives were arguing that in the actual situation, concerning the 'high influx of refugees', the provisions of the directive would function as a pull factor and would lead to a collapse of the local municipalities – framing reception as a problem caused by refugees and not caused by social and financial policies. Gerda Hasselfeldt, the leading member of the Christian Social Union from Bavaria in the German Bundestag, stated that the Reception Conditions Directive is outdated and that other Member States also denied the implementation. Her argument in a nutshell: Because other Member States are acting against European law, Germany can do it as well!

This argument is absurd, considering that the Conservatives were pushing ideas of establishing so called transit zones at the German land border. Article 43 of the Procedure Directive⁵ would allow Member States to check asylum claims at the border by denying refugees entrance to state territory. The Commission reminded the German government that transit zones 'make sense at external borders'⁶ – obviously not inside the EU. And the consequences of transit zones could be observed in September 2015 at the Hungarian border, when the police was attacking refugees with water cannons and heavily armed officers.⁷ The German Conservatives are very selective in their treatment of EU law as they want to implement the most repressive tools of the directives, although these are not binding but in discretion of the Member States. On the other hand they are rejecting those regulations which must be implemented in national law.

3. INFLUENCE OF THE DIRECTIVE ON GERMAN ASYLUM LAW

3.1 Detention

Article 8 of the Directive is regulating the admissibility of detention of refugees. The directive prohibits detention solely for the reason that the person is an applicant for asylum. But the directive is proposing reasons for detention 'on the basis of an individual assessment [...] if other less coercive alternative measures cannot be applied effectively'. According to the directive detention is admissible for verifying the identity, determine the elements on which the application is based, for the decision on the applicant's right to enter the territory, for the re-

⁵ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection OJ L180/60, 29 June 2013 (Recast APD).

⁶ EU-Observer 13.10.2015, <https://euobserver.com/migration/130664>.

⁷ Hungarian Helsinki Committee, *No Country for Refugees, New asylum rules deny protection to refugees and lead to unprecedented human rights violations in Hungary*, Information Note, 18.09.2015, <http://www.helsinki.hu/en/no-country-for-refugees-information-note/>.

turn procedure and for protection of national security. The German government listed all of these reasons in a draft of an asylum law package in November 2015. Also the Ministry of Interior was legitimizing this draft with reference to the directive, although this part of the directive is not an obligation for the Member States since favorable conditions in national law must be maintained under Article 4.

To consider in which manner these reasons would change German law, a short look at the actual detention law system for refugees is needed. It is regulated on the following principles: Generally the detention of asylum seekers is only permissible if the asylum claim is filed during the custody of the applicant. And even then the applicant shall be discharged after four weeks if the migration authority has not made any decision.. In principle the permission for a person who has arrived in Germany via a safe country is only admissible, when the asylum claim is filed. In practice the federal police applies for the detention of refugees at a time, when the asylum claim was not sent to the migration authority to enable detention. So the detention of asylum seekers is only allowed under very harsh restrictions. Detention of refugees whose asylum claim was denied is only possible for the enforcement of deportation. The European Court of Justice adjudicated firm decisions in 2014 which showed the unlawful structure of German detention systems.⁸ The CJEU decided that refugees should not be put into detention with 'normal' prisoners under the Return Directive.

'Article 16(1) of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals must be interpreted as requiring a Member State, as a rule, to detain illegally staying third-country nationals for the purpose of removal in a specialised detention facility of that State even if the Member State has a federal structure and the federated state competent to decide upon and carry out such detention under national law does not have such a detention facility.'⁹

The Court forced German authorities to release almost every imprisoned refugee and actually there are less than 100 refugees in German prisons as the state was not able to build up capacities. As a result detention for asylum seekers is allowed only under strict conditions and detention for rejected refugees only for the enforcement of deportation.

In contrast, the reasons for detention under the Reception Conditions Directive are different to German law. If the government will implement these reasons then there would be a system change in detention law. The proposed changes enable the authorities generally to imprison refugees, because they have not the required documents. This could mean, that asylum seekers who have a temporary residence permit according to their claim, can also be detained. The assurance of deportation is obviously not the purpose of detention-

⁸ CJEU, 17.7.2014, C-473/13 (*Bero*) and C-514/13 (*Bouzalmate*).

⁹ *Ibid.*, at para. 33.

regularities under the Reception Conditions Directive. The new reasons of detention of the Reception Conditions Directive serve completely different purposes, namely the determination of facts which are important for the decision of the asylum claim. This has nothing to do with the purpose of the German detention system. It is also questionable whether these reasons for detention are in conformity with Article 5 of the ECHR. According to Article 5 the lawful arrest or detention of foreigners is only permissible to 'prevent his/her effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition'. For persons with a residence permit there is no extradition process concerning the ECHR.

On this point, the implementation of the directive would not have the effect of progressively change German law, but would be a rollback for the fight against detention. Unfortunately during the drafting process of the directive the critic from refugee organizations on that point were not effective enough.

3.2 Social Services

The regularities of detention will lead to a more repressive asylum law in Germany. In comparison the provisions for material reception conditions and health care could have positive effects for the social rights of refugees.

The new asylum law from October 2015 by the government was a re-actualization of the deterrence rhetoric of the 1990's. Under the new law, the authorities can reduce the social benefits of refugees, more precisely, the social-cultural minimum wage. The German Constitutional Court ruled in 2012 that the principles of the social welfare state and human dignity are establishing the right for asylum seekers to guarantee a dignified minimum existence as a human right.¹⁰ Besides the costs for shelter, food and clothing, refugees in Germany get 143 Euro by the state so that they can independently participate socially, culturally and politically in society. Considering the Constitutional Court: '*Human dignity may not be relativised by migration-policy considerations.*'¹¹

Different refugee groups are affected by the new law and have to fear the reduction of their social-cultural minimum wage. *First*, refugees whose asylum claim is rejected and who have a fixed date for deportation, which could not be executed because of self-imposed reasons by the refugee. *Second*, all refugees whose deportation is suspended for self-imposed reasons. In practice the authorities claim that 90% of these refugees are responsible for failed deportations. These two groups are not affected by the Reception Conditions Directive as they are not in the asylum procedure.

The *third group* are all refugees who were relocated by the new hot-spot procedure by the EU on the Greek Islands and in Italy and who migrated from the responsible state to Germany. It is uncertain how the hot-spot-procedure is car-

¹⁰ BVerfG 18.7.2012, 1 BvL 10/10 and 1 BvL 2/11, <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2012/bvg12-056.html>.

¹¹ *Ibid.*, at 121.

ried out legally, but obviously refugees affected by the procedure are in the scope of the directive as they are applicants for asylum.

Concerning the tightening of asylum law, the Reception Conditions Directive could be useful to litigate against the national law before the CJEU. Under Art. 17 Member States must guarantee an adequate standard of living for applicants, especially the necessary subsistence and protection of their physical and mental health. This is just the standard and the directive also proclaims that the Member States are allowed to grant less favorable treatment of refugees than for their own citizens. But this reduction is only allowed in general and Germany is already in accordance with this regulation as the social benefits for refugees are lower than for German citizens or migrants with residence permits. So Article 17 is not a reference point for legitimizing the reduction of social benefits for the refugee groups of the new law.

In contrast to general reductions offered by the directive, the new law contains reductions as sanctions for refugees who oppose deportations or authoritative relocation decisions.

Under Article 20 reductions of social benefits are only allowed when the applicant is moving away from his allocated location inside the Member State without permission by the authorities. But the law sanctions people who are opposing the relocation system of the EU and are migrating within the EU – that is an important difference in reading the directive closely. Under the directive the social reductions by the new German asylum law are not in accordance with European Law. As a consequence the concerned paragraphs of the new law must be disappplied. In Germany many lawyers are also proposing to litigate the reduction of social benefits before the German Constitutional Court as the new rules are obviously not in accordance with the judgment of 2012. *‘Human dignity may not be relativised by migration-policy considerations’* – this is a fundamental principle of the constitution and cannot be ignored by the government, even when there are a lot more refugees in Germany than before.

3.3 Access to Medical Assistance for Persons with Special Needs

Art. 21 broadens the scope for vulnerable persons. These include minors, unaccompanied minors, disabled people, elderly, pregnant women, single parents with minor children, victims of trafficking, persons with serious physical illness and people with mental disorders or persons who have experienced torture, rape or other serious forms of violence. The Directive under Art. 19 provides the necessary health care and psychological assistance. The state must also implement a procedure to determine which applicants have special needs.

In Germany the medical care of asylum seekers is limited to emergency care and we have no adequate screening process for persons with special needs. Germany even didn’t implement the old Reception Conditions Directive concerning the identification of vulnerable persons. There is no experience with such screening processes and the Ministry of Interior presented no concept in the latest draft of the implementation law. The German Community of Psychosocial

Centers for Refugees and Victims of Torture¹² developed a concept for counseling, detection and treatment of fugitives.

The advice about the benefits from the directive must be part of the asylum procedure as quickly as possible. There is need of information schedules during the initial reception or in close proximity. The advice should include: initial consultation and information with psychosocial focus. When signs for vulnerability arise, then a skilled attendant must be ordered for the refugee. The identification of vulnerable persons is not only part of the initial asylum procedure as many psychological and traumatic disabilities could not be identified quickly, but could emanate after a long time. So psychological advice and supervision is not only needed during the time of registration, but also after the relocation of refugees to cities and within their shelters. Also the identification of vulnerable groups cannot be carried out by standardized procedures. Instruments like the PROTECT Questionnaire¹³ are problematic and cannot replace an identification by professionals.

4. CONCLUSION

I wanted to show how ambivalent the implementation of the Reception Conditions Directive could be carried out. Concerning detention the directive is no support in strengthening the rights of refugees. For social benefits and medical assistance the directive will have positive effects and lead to new obligations in the human treatment of refugees. But furthermore the main problem with the directive is its lack of concrete provisions and procedure. There is too much discretion for the Member States in implementing the directive. And as in every field of European Asylum law: The normative understanding of the directive is that every Member State is capable in creating equivalent social structures for refugees. If we have no answer to the social question in Europe, than we have no answer to the reception question.

¹² <http://www.baff-zentren.org/>.

¹³ <http://protect-able.eu/faq/>.

10. Detention of Asylum Seekers: Interaction between the Return and Reception Conditions Directives in Bulgaria

Valeria Ilareva^{*}

In the process of transposition of the recast Reception Conditions Directive 2013/33/EU¹ Bulgaria amended its national asylum law to introduce for the first time the possibility of detention of asylum seekers as of 01 January 2016. Until that moment the Bulgarian legislation had not formally envisaged detention of asylum seekers, but in practice asylum seekers have been detained as irregular immigrants. Detention happens under the Return Directive 2008/115/EC² prior to giving asylum seekers access to the asylum procedure.³ Therefore, the new detention regime under the asylum law (Directive 2013/33) will complement the period of detention of asylum seekers, which starts to run under the regime of immigration law (Directive 2008/115). The interaction and the differentiation of the two distinct legal regimes of detention of persons who seek asylum is the focus of this article. The analysis looks at the purpose and grounds for detention under the Reception Conditions and the Return Directives, as well as at the respective length of detention, available remedies and detention conditions. The article further examines the conditions for lawfulness of the 'switch' of detention under a different legal regime.

1. PURPOSE AND GROUNDS FOR DETENTION

According to Recital 9 of the Preamble of the Return Directive 2008/115/EC, a third-country national who has applied for asylum in a Member State should not be regarded as staying illegally on the territory of that Member State until a negative decision on the application, or a decision ending his or her right of stay as asylum seeker has entered into force. Consequently, Article 2 of the EU Return Directive clearly defines its scope as applying to third-country nationals staying illegally on the territory of a Member State. The purpose of immigration detention of 'a third-country national who is the subject of return procedures'

^{*} This article was published before on the Odysseus blog (<http://eumigrationlawblog.eu/detention-of-asylum-seekers-interaction-between-the-return-and-reception-conditions-directives-in-Bulgaria/>).

¹ <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0096:0116:EN:PDF>.

² <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32008L0115>.

³ V. Ilareva, *Arbitrariness regarding Access to the Asylum Procedure in Bulgaria*. Information Note. 2 January 2012, <https://docs.google.com/viewerng/viewer?url=http://farbg.eu/wp-content/uploads/Information-Note-Access.pdf&hl>

under Article 15 (1) of the Return Directive is 'to prepare the return and/or carry out the removal process'.

Unlike the purpose of detention of illegally staying immigrants under the Return Directive, detention of asylum seekers under the recast Reception Conditions Directive serves a different aim. According to the fundamental principle of *non-refoulement* in refugee law, asylum seekers as a rule cannot be subject of return procedures. Article 8, paragraph 3 of Directive 2013/33/EU enumerates exhaustively six various grounds for detention of asylum seekers:

- '(a) in order to determine or verify the 'identity or nationality' of asylum seekers;
- (b) in order to determine those elements on which the application for international protection is based which could not be obtained in the absence of detention, in particular when there is a risk of absconding of the applicant;
- (c) in order to decide, in the context of a procedure, on the applicant's right to enter the territory (Bulgaria does not apply such an admissibility procedure and therefore this ground for detention has not been transposed);
- (d) when the asylum seeker is detained subject to a return procedure under Directive 2008/115/EC, "in order to prepare the return and/or carry out the removal process, and the Member State concerned can substantiate on the basis of objective criteria, including that he or she already had the opportunity to access the asylum procedure, that there are reasonable grounds to believe that he or she is making the application for international protection merely in order to delay or frustrate the enforcement of the return decision";
- (e) when "protection of national security or public order so requires";
- (f) in accordance with Article 28 of the Dublin Regulation (EU) No 604/2013 for the purpose of a transfer to the Member State responsible for examining the application for international protection and when there is a significant risk of absconding of the asylum seeker.'

As the grounds for detention are different under the immigration regime and under the asylum regime, so are the authorities competent to issue the respective detention orders. In Bulgaria, detention orders facilitating return are issued by the administrative body that issued the return/removal decision or by the Director of the Migration Directorate at the Ministry of the Interior. On the other hand, under the amendments in the asylum legislation, the competent authority to issue detention orders for asylum seekers is the head of the State Agency for Refugees (or an official authorized by him), who is also the decision-making body on the applications for international protection in the country. Detention for the purpose of return is stipulated in the *Law on Foreign Nationals in the Republic of Bulgaria*. Detention of asylum seekers is regulated by the *Law on Asylum and Refugees*.

In view of the fact that both detention regimes relate to deprivation of liberty for administrative reasons, they have similar fundamental principles. Both the Return Directive (Article 15, paragraph 1 and Recital 16 of the Preamble) and the recast Reception Conditions Directive (Article 8, paragraph 2 and Recital 15 of the Preamble) provide that detention is a measure of last resort applied only in

exceptional circumstances defined in law and subject to the principle of necessity and proportionality with regard to the manner of detention and the purpose pursued. Priority shall be given to less coercive measures that serve the same objectives. Another feature of detention under both Directives is that the administrative procedures relating to the grounds for detention (e.g. removal or securing the participation of the third country national in the examination of his/her asylum application) shall be implemented with 'due diligence'. There shall be an individual approach. The fact that one is staying illegally or the fact that one is an asylum seeker is not in itself a sufficient ground for his/her detention.

2. LENGTH OF DETENTION

The length of detention is the main issue that preoccupies every detainee. "*How long will I stay here?*" is the first question that they ask at the detention centre. Detainees count every day of their deprivation of liberty and, if they are informed of the timeframe of their detention, they know exactly the number of days left to freedom. Lack of an exact time limit to detention leads to deep insecurity and anxiety.

The Return Directive provides for a maximum time limit of detention of 18 months, which has also been adopted in Bulgarian law. Every six months there is *ex officio* judicial review of the length of detention for the purpose of return/removal, but it cannot be extended beyond 18 months.

With regard to asylum seekers, however, neither the recast Reception Conditions Directive, nor Bulgarian national law, provide for an exact time limit of the length of detention. Article 45b (1) of the Bulgarian Law on Asylum and Refugees only states that detention shall be 'temporary and for the shortest possible period'. This wording is in line with Recital 16 of the Preamble and Article 9 (1) of Directive 2013/33/EU, which requires that in accordance with the 'due diligence' notion, 'Member States take concrete and meaningful steps to ensure that the time needed to verify the grounds for detention is as short as possible, and that there is a real prospect that such verification can be carried out successfully in the shortest possible time. Detention shall not exceed the time reasonably needed to complete the relevant procedures.' It remains to be seen how these legal phrases will be interpreted and applied in practice and whether the national case law will allow for longer detention of asylum seekers than of irregular migrants.

3. AVAILABLE REMEDIES

Remedies against detention can be classified in two types. The first ones concern the lawfulness of the initial detention order. The second type of remedies concern the lawfulness of the length of detention.

Speediness is the crucial legal requirement with regard to review of the lawfulness of detention (Article 15, Paragraph 2 of the Return Directive and Article

9, Paragraph 3 of the recast Reception Conditions Directive). Bulgarian asylum law, however, has not fulfilled the requirement of Article 9 (3) of Directive 2013/33 that Member States shall define in national law the period within which the judicial review shall be conducted. Article 45c (5) of the national *Law on Asylum and Refugees* only provides that the detention order can be appealed under the general procedure of the *Code on Administrative Procedure*; the appeal does not suspend the execution of the detention order and the judgment of the first court is final. Thus the available remedies under the national asylum regime are less favorable in comparison with the remedies regarding immigration detention of illegally staying immigrants. In the latter case, the *Law on Foreign Nationals in the Republic of Bulgaria* provides that the decision of the court shall be issued within one month from initiation of the court proceedings. The workload of administrative judges who decide on the lawfulness of detention is significant and lack of prioritization of asylum detention cases tends to add to the length of detention of asylum seekers.

The above setback might be compensated by the remedies for review of the duration of detention. Article 45d, paragraph 3 of the *Law on Asylum and Refugees (LAR)* provides that upon establishment of new data and circumstances or by request of the detained asylum seeker, within 7 days the competent authority shall issue a reasoned decision whether to continue or discontinue the detention. This decision is subject to appeal under the same rules as described above with regard to the initial detention order. An important guarantee in this regard is the explicit provision of paragraph 5 of Article 45d LAR, which states that non-completion of the asylum proceedings within the period prescribed in the law, which is not the fault of the asylum seeker, cannot be a ground for extension of the length of detention.

4. DETENTION CONDITIONS

Under the new asylum detention regime in Bulgarian law, third country nationals have to be moved to a different place when the ground for their detention leaves the scope of Directive 2008/115 and falls within the scope of Directive 2013/33. Currently the detention centres for irregular migrants in Bulgaria are under the auspices of the Migration Directorate at the Ministry of Interior. The detention centres for asylum seekers as of 01 January 2016 constitute 'closed departments' at the reception centres for asylum seekers under the auspices of the head of the State Agency for Refugees (appointed by the Prime Minister following a decision of the Council of Ministers). The national law guarantees detained asylum seekers access to open air spaces; visits by family members, lawyers and representatives of non-governmental and international organizations, access to information, as well as respect for privacy.

It is noteworthy, however, that while the detention regime of irregular migrants under the *Law on Foreign Nationals in the Republic of Bulgaria* explicitly prohibits detention of unaccompanied minors, detention of unaccompanied

minor asylum seekers is permitted by the new asylum regime. According to Article 45f of LAR, detention of children can take place as a last resort 'with a view to preserving family unity or to guarantee their protection and security'. It is hard to find the compatibility of the cited national provision with Article 37 of the Convention on the Rights of the Child and the requirement that detention shall be a measure of last resort.

5. SWITCH OF REGIMES

In the Bulgarian administrative practice access to the asylum procedure is not automatic upon submission of the asylum application, as required by Article 3 of the Asylum Procedures Directive 2013/32/EU.⁴ Usually asylum seekers who have entered the country irregularly are immediately issued removal orders and detained for the purpose of their execution. It is against this background that asylum seekers make their applications for international protection, often from within the detention centre for irregular immigrants. Their asylum application is forwarded to the State Agency for Refugees, which is the competent institution to register the third country nationals as asylum seekers and accommodate them in the reception centres for asylum seekers. For the latter there is no time limit in national law, which makes access to the asylum procedure arbitrary.⁵ registration as asylum seeker might take from several days to several months (if the asylum seekers' removal order has not been carried out in the meantime). By national law, upon registration as asylum seeker, the implementation of one's removal order is suspended until a final negative decision on the asylum application enters into force. However, in practice detention of asylum seekers in Bulgaria has been allowed until they are admitted in the so-called 'regular' asylum procedure, because the head of the State Agency for Refugees has issued an order that the immigration centres can be used as 'transit centres' for carrying out the Dublin procedure and for processing manifestly unfounded applications for international protection.

Thus, in the Case of *Kadzoev* C-357/09 PPU,⁶ the asylum seeker Mr. Said Kadzoev had been placed in immigration detention for the purpose of removal and his asylum application was registered as late as 7 months after it was made. Mr. Kadzoev's asylum application was processed and rejected as manifestly unfounded in the immigration detention centre, in spite of credible accounts that he was a torture victim. In national court proceedings the question arose 'whether, when calculating the period of detention for the purpose of removal under Article 15(5) and (6) of Directive 2008/115, the period must be included during which the execution of the removal decision was suspended because of the ex-

⁴ <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32013L0032>.

⁵ <https://docs.google.com/viewerng/viewer?url=http://farbg.eu/wp-content/uploads/Information-Note-Access.pdf&hl>.

⁶ CJEU 30 November 2009, C-357/09 PPU, *Said Shamilovich Kadzoev* (*Huchbarov*).

amination of an application for asylum'.⁷ The Court of Justice noted that detention for the purpose of removal governed by Directive 2008/115 and detention of an asylum seeker 'fall under different legal rules' (para. 45). Consequently, the Luxembourg Court answered that a period during which a person has been held in a detention centre on the basis of a decision taken pursuant to the provisions of national and Union law concerning asylum seekers may not be regarded as detention for the purpose of removal within the meaning of Article 15 of Directive 2008/115. The latter was not the case with Mr. Kadzoev, whose detention during the asylum procedure had continued on the basis of the detention order for the purpose of removal. The Bulgarian national legislation did not contain a legal ground for detention of asylum seekers.

In the Case of *Arslan* C-534/11,⁸ the Court of Justice of the European Union elaborated further the conditions, upon which a third country national may continue to be detained upon change of status from 'irregular immigrant' to 'asylum seeker'. The Court found that the Reception Conditions Directive and the Asylum Procedures Directive do not preclude a third-country national who has applied for international protection after having been detained under Article 15 of Directive 2008/115 from being kept in detention on the basis of a provision of national law, where it appears, after an assessment on a case-by-case basis of all the relevant circumstances, that the application was made solely to delay or jeopardise the enforcement of the return decision and that it is objectively necessary to maintain detention to prevent the person concerned from permanently evading his return. The joint reading of the cases of *Kadzoev* and *Arslan*, along the lines of Directives 2008/115 and 2013/33, reveals that should the authorities wish to continue the detention of a third country national, the competent body shall issue a new detention order on a national law ground in the field of asylum.

6. CONCLUSION

Differentiation of the legal regimes of detention under migration and under asylum law respectively has important practical consequences. It makes the authorities conscious of the purpose of detention and the steps needed for its effective achievement. Such distinction might prevent aimless detention of asylum seekers and stop their exposure to a real risk of *refoulement* under the regime for illegally staying third country nationals. The analysis of the two regimes in Bulgaria has revealed that, paradoxically, in some instances (such as the length of detention, speediness of judicial review, possibility to detain unaccompanied children), the national transposition of EU law has led to less favourable treatment of third country nationals under the detention regime of asylum seekers in

⁷ Paragraph 40 of the Judgment (<http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7dof130d5a16ffbba098864445929ff15ff3684b79.e34KaxiLc3eQc4oLaxqMbN4O4Oc3aKeo?text=&docid=72526&pageIndex=o&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=81730>).

⁸ CJEU 4 October 2013, C-534/11, *Mehmet Arslan*.

comparison with the detention regime of irregular migrants. Asylum seekers however have a special standing under EU and International law, which takes into account their specific vulnerability. Any detention of asylum seekers exposes them to a high risk of retraumatization and reduces the future prospects of successful adaptation and eventual integration in the host society.

EPILOGUE

Reception for Asylum-seekers in the EU in a Time of 'Crisis'

Madeline Garlick*

1. INTRODUCTION

Providing adequate reception conditions to those seeking international protection is an essential part of ensuring respect for the right to asylum. People claiming to fear persecution or serious harm may be refugees or otherwise in need of protection, and as such, are entitled to legal rights under international law, even before their status is recognised in a domestic asylum procedure.¹ Reception in accordance with recognised international standards is also necessary to ensure access to the asylum process: people claiming to fear persecution or serious harm will only be in a position effectively to pursue their applications if their basic needs are met, including to shelter and subsistence, but also essential medical care and attention to special needs. As such, the availability of reception conditions may determine the extent to which a State is in a position to fulfil its protection obligations.

The 1951 Convention does not elaborate on the rights of refugees who are awaiting a determination of their claims for international protection. However, human rights instruments contain a range of entitlements which are applicable to all those in a State's territory or under its jurisdiction, including asylum-seekers.² Among other core human rights applicable to all persons, in all situa-

* The views expressed in this article are those of the author and do not necessarily represent the position of the United Nations or UNHCR.

¹ This is because refugee status is declaratory, rather than constitutive, in nature: UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determination of Refugee Status under the 1951 Convention and 1967 Protocol Relating to the Status of Refugees*, Geneva: UNHCR 1992, reissued 2011). UNHCR also argues that under international law, at a minimum, the 1951 Convention provisions that are not linked to lawful stay or residence apply also to asylum-seekers, namely Articles 3 (non-discrimination), 4 (religion), 5 (rights granted apart from this Convention), 7 (exemption from reciprocity), 8 (exemption from exceptional measures), 12 (personal status), 16 (access to courts), 20 (rationing), 22 (public education); 31 (non-penalisation of refugees unlawfully in the country), and 33 (*non-refoulement*). Additional rights under the 1951 Convention apply to refugees who are 'lawfully staying' in the territory. On the progressive acquisition of rights by asylum-seekers and refugees, see also University of Michigan Law School, *The Michigan Guidelines on Protection Elsewhere*, 3 January 2007, available at: <http://www.refworld.org/docid/4aegacdod.html>.

² See UNHCR ExCom Conclusion No. 82 (XLVIII) on safeguarding asylum, 1997, in which States acknowledge that international human rights law is relevant to defining reception standards for asylum-seekers. See also See ExCom Conclusion No. 22 (XXXII) of 1981 for standards of treatment for persons arriving as part of a large scale influx.

tions, the Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) enshrine the right of all individuals to an adequate standard of living, encompassing the provision of food, clothing and accommodation to those asylum-seekers who do not have access to them otherwise. The International Covenant on Civil and Political Rights (ICCPR) affords protection against arbitrary detention, a principle which is also reflected in the European Convention on Human Rights (ECHR). The Convention on the Rights of the Child (CRC) also articulates the obligation of States parties to ensure that children's best interests are a primary consideration in all decisions and processes affecting them, which includes asylum-seeking children, whether in the care of or separated from their families or adults responsible for them.

Efforts have been made at international,³ as well as at regional level, to define harmonised or common standards for reception. The original EU Reception Conditions Directive, adopted in 2003,⁴ introduced minimum standards which bound all Member States – some of which did not have clear legal obligations concerning reception enshrined in national legislation at the time. As such, it represented an important – if far from perfect – foundation for effective reception systems and capacity across the EU.

The recast Directive⁵ of 2013 reaffirmed the commitment of the EU and Member States to ensuring consistent, high standards of reception as part of the Common European Asylum System (CEAS). Recital 5 of the Preamble to the recast Directive recalled that the EU's heads of State and government, in the Stockholm Programme, had underlined that it was 'crucial that individuals, regardless of the Member State in which their application for international protection is made, are offered an equivalent level of treatment as regards reception conditions.' Yet consistency was not the Member State's sole objective: Recital 7 acknowledged the need to 'ensur[e] improved reception conditions for applicants for international protection', going beyond those defined in the original Directive. Other ambitious goals expressed in the Preamble included improving the efficiency of national reception systems and cooperation among States,⁶ as well as inter-State solidarity, as a core principle governing the operation of the CEAS more widely.⁷

The review chronicled in this volume has examined strengths and weaknesses of the recast Reception Conditions Directive. Among other things, it iden-

³ UNHCR, *Global Consultations: Reception of asylum-seekers, including standards of treatment, in the context of individual asylum systems*, EC/GC/01/17, 4 September 2001.

⁴ Council of the European Union, *Council Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers in Member States*, OJ 2003 L 31/18.

⁵ European Union, *Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of asylum-seekers (recast)*, OJ 2013 No. L 180/96 (hereafter 'Reception Conditions Directive').

⁶ Reception Conditions Directive, Recital 26.

⁷ Reception Conditions Directive, Recital 2.

tifies areas where practice needs improvement, where interpretive judicial guidance could be required, and where further changes to the Directive might be necessary, potentially in the course of change amendments foreseen by the European Commission in or after 2016.⁸ The need to consider further reform has been highlighted sharply in the course of 2015-16, as European asylum systems have come under major pressure. This chapter aims to draw together key threads from its predecessors, in order to inform further thinking on way forward to strengthen reception conditions in Europe, and respect in practice for asylum-seekers' rights in the EU.

2. MATERIAL AND PERSONAL SCOPE OF THE DIRECTIVE

The Reception Conditions Directive provides a clear legal basis for an individual, enforceable entitlement on the part of asylum-seekers to material reception conditions and other benefits. However, the specific content of that entitlement – what precise facilities, services and levels of material and other forms of support it demands – is less clear. Article 17(2)'s requirement that material reception conditions provide an 'adequate standard of living,' defined as one which 'guarantees subsistence and protects their physical and mental health'. However, a wide margin for interpretation remains regarding the definition of a living standard which is 'adequate', prompting wider questions around the Directive's aims (adequate for what?). Different views could also be taken as to the levels of 'subsistence' and protection for 'physical and mental health' which are required. Moreover, while the Directive articulates certain minimum standards for the provision of housing, the Directive foresees 'different modalities' of accommodation – including money for payment of rent, housing provided in collective centres, temporary structures, tents and potentially other facilities. It also admits the possibility of different standards when 'exceptional circumstances' might require it, effectively giving wide latitude to States to determine the level of investments they choose to make. It is noteworthy however that the Court of Justice of the EU has confirmed⁹ that there is an obligation to house asylum-seekers in reasonable conditions which cannot be disregarded.

The Directive's personal scope is also defined in a way which could admit widely diverging approaches. Article 2(b) defines an 'applicant' as a person who has made an application for protection; but it fails to specify whether this occurs at the point when the desire to seek protection is expressed; when a claim is registered, or when it is formally lodged in accordance with the Asylum Proce-

⁸ European Commission, *Communication to the European Parliament and to the Council: Towards a reform of the Common European Asylum System and enhancing avenues to Europe*, COM(2016) 197 final, 6 April 2016.

⁹ See Court of Justice of the EU, Case C-79/13, *Federaal agentschap voor de opvang van asielzoekers v Selver Saciri and Others*, 30 July 2015.

dures Directive.¹⁰ While it can be argued that while States' obligations to provide reception arise only when an application is formally registered, it is not open to States to seek to reduce or divest themselves of their obligations by failing, by act or omission, to facilitate registration of claims.

3. PROGRESSIVE DEVELOPMENT OF STANDARDS – IN WHICH DIRECTION?

Any assessment of the Directive's impact should be informed by an examination of the process of negotiating and adopting the recast Directive. This includes the manner in which some standards were essentially eroded, from the time at which the initial proposal was put forward by the Commission,¹¹ when reception infrastructure and systems were under minimal pressure, through the tabling of a revised proposal in 2011,¹² up to 2013, when asylum-seeker numbers were rising and reservations and opposition growing among some States to the adoption of rigorous new EU standards.

While the rules governing detention of asylum-seekers were strengthened by the recast, some of its provisions raise questions about respect for international standards. The refusal of the Council in the 2003 Directive to agree to defined legal grounds on which detention could lawfully be used, or to mandatory judicial oversight or minimum standards for conditions in detention, meant that asylum-seekers were protected by fewer safeguards than irregularly-present migrants, whose detention was regulated by the Returns Directive.¹³ With the adoption of the recast, exhaustively-defined grounds on which asylum-seekers can lawfully be detained have been enshrined for the first time in EU law. At the same time considerable scope was left open in the final text for broad and differing approaches to interpretation and application of these provisions. The recast also established the requirement for detention to be ordered by courts, or at least swiftly and regularly reviewed in a judicial process (Article 9). The recast has also prescribed minimum conditions, including obligations to ensure that asy-

¹⁰ The Asylum Procedures Directive (Directive 2013/32/EU) contains specific provisions, strengthened in the recast process, to ensure effective access to the asylum procedure. These require responsible national authorities to ensure, when a person makes an application, that the claim is registered within three working days (or six if the application is referred from another authority): Article 6(1). Thereafter, the MS are obliged to provide an effective opportunity to the applicant to lodge the claim: Article 6(2).

¹¹ European Commission, *Proposal for a directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum-seekers (Recast)*, COM(2008) 815 final, 2008/0244(COD), {SEC(2008)2944}, {SEC(2008)2945}, 3 December 2008.

¹² See European Commission, *Amended proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of asylum seekers (Recast)*, COM(2011) 320, 1 June 2011.

¹³ European Union, *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals*, OJ 2008 No. L348/98.

lum-seekers are not detained together with persons accused or convicted of crimes, nor subject to extreme overcrowding, and that private and family life and the rights of children are respected (under Article 10).

Despite these positive features, however, implementation of basic safeguards regarding detention has proven extremely problematic in practice. Reports indicate that in some cases, legal grounds for detention are invoked without full consideration of their applicability in the individual's case; judicial review is not effective in practice; or conditions are below the minimum standards, which remain difficult to enforce in the absence of independent monitoring and dedicated resources. As a result, it can be questioned whether the standards of fundamental rights, including those established by the jurisprudence of the European Court of Human Rights, are being met in practice in many cases. As the numbers of people arriving and being detained in Member States grows, the importance of legal challenges to excessive or unlawful use of unlawful detention in national and European courts has increased, as a source of redress in individual cases and broader guidance through precedent-setting jurisprudence.

4. PERSONS WITH SPECIAL RECEPTION NEEDS

The obligation to ensure that persons with 'special reception needs' are identified and provided with appropriate support is a further new positive element in the recast Directive (Chapter IV on 'Provisions for vulnerable persons', Articles 21-25). However, several factors appear to have constrained their effective use in practice, including resource constraints and limited specialised expertise among medical professionals, counsellors and other experts with training in identifying and responding to special needs. Some States expressed concern during the recast negotiations about the perceived risk of 'misuse' by applicants who might invoke vulnerabilities to delay the process, or use the associated safeguards to increase their prospects of receiving protection. However, it is argued that the possibility of some people claiming to have special needs without foundation, demands a rigorous and professional process of identification, rather than a restrictive approach or narrow interpretation of the rules. The latter could lead to wrong decisions and failure to respect the rights of vulnerable people.

5. OPT-OUTS

Two EU Member States with the right to opt out of asylum instruments – the UK and Ireland – have exercised that entitlement in relation to the recast Reception Directive. They thus remain bound by the original Directive but not the recast, resulting in an anomalous 'two-tiered' reception regime in the EU. The objective of harmonised EU-wide approaches – unequivocally expressed in Recital 5 of the recast's Preamble (and in Recital 8 of the Preamble of the 2003 Directive, in which the two countries participated) – is clearly not served by this outcome. It has also limited the ability of the courts in the UK and Ireland to ensure that ade-

quate standards are observed in practice, notably on those matters which were not regulated in detail or only through lower standards in the original Directive. Practitioners in those jurisdictions may use other sources of law, such as social assistance or child protection rules. However, these are unlikely in all cases to address the situation of asylum-seekers with sufficient specificity. In a climate of negativity towards the Charter of Fundamental Rights and other aspects of EU law in some countries, along with political resistance to the notion of EU regulation and administrative formalism, the risk that asylum-seekers rights are insufficiently protected in law, and will not benefit from the advances made at EU level, is real.

6. ILLUSTRATING THE CHALLENGE: A SNAPSHOT OF SELECTED NATIONAL LAWS AND PRACTICE

The range and complexity of ongoing challenges to ensuring adequate reception standards in what was foreseen as a harmonised Common European Asylum System (CEAS) are clearly demonstrated in individual national contexts. In France, while reception standards have improved since the adoption of the recast, major gaps are still reported. These include insufficient provision of accommodation, notably in the urban areas where most asylum-seekers are situated, as well as low levels of social welfare coupled with a strict approach to the nine-month period during which asylum-seekers may not be permitted to work. In Poland, a mixed picture emerges. While the legislation in some areas provides for standards that improve on the Directive's minima, there remains a failure, in the view of some stakeholders, to ensure a 'dignified standard of living' in all cases, as required by the Directive.

In Italy, the constant challenge remains of how to move from 'emergency' reception mode into a more robust, comprehensive system of reception which guarantees effective access to the asylum procedure and to treatment in line with EU law. Italy is among the Member States affected more profoundly by large-scale arrivals in 2015-16, following significant displacement from North Africa in 2011, and continually facing the particular responsibilities and human needs associated with sea arrivals. The country's efforts to develop its reception framework into a responsive, predictable and well-organised system have encountered numerous obstacles over the years, not least the difficulty of coordinating a host of actors with varying levels of resources at different levels of government and civil society. With the establishment of 'hotspots' in 2015,¹⁴ staffed by personnel from different EU agencies, Member States and international and other organisations, questions have arisen about whether and how the EU reception standards are applied in these exceptional facilities. Described as a 'lawless'

¹⁴ The 'hotspot' approach was first proposed by the Commission in the Agenda on Migration of 2015: *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Agenda on Migration*, COM (2015)240, 13.5.2015.

zone', asylum-seekers arriving in Italy in some hotspots – which are designed to ensure more effective management of arrivals – are reported to have been denied access to the procedure or to adequate reception standards.

In Greece, where the hotspot concept has also raised questions of inconsistency with European obligations, persisting problems are seen in reception more broadly. Five years after the *MSS*¹⁵ judgment of the European Court of Human Rights, Greece's nascent reception structures and institutional arrangements were over swept by arrivals on a large scale from approximately 2014. Official reports have confirmed that the numbers and standards of reception places in Greece remain woefully insufficient to address needs. This is most visible on the islands where hundreds of thousands of people, including a significant proportion of families and children, have arrived. FYROM's decision to close its border with Greece led to the build-up of thousands of people staying without shelter or sustenance in the frontier regions, until UNHCR and other organisations stepped in to provide basic facilities.

The problem of excessive use of detention in substandard conditions in Greece acquired a new dimension in early 2016. Following an agreement between Turkey and the EU to return arrivals crossing the Aegean from Greece to Turkey, Greece's hotspots were transformed swiftly from open into closed facilities. With no individual examination of whether the grounds for detention were satisfied in each case, it appeared that the Reception Conditions Directive's stipulations were not being observed. After UNHCR and other organisations withdrew their services in protest, there remains a risk at the time of writing that conditions and treatment in those facilities will not meet EU and international legal standards or individual needs. Under present conditions, the difficulties in lifting reception in Greece to the requisite level in 2016 are readily apparent. However, the question of why it was not possible to put a functioning system in place in earlier times, under lower pressure, remains unanswered. With the momentum created by the European Courts' clear rulings that Greek reception conditions violated human rights, and the resources and political interest that focused on Greece at EU level thereafter, an unprecedented opportunity existed to build a reception framework in line with EU and international law. The failure to take that opportunity paved the way for the shortcomings and individual hardship that has become evident now.

In the Netherlands, where a strong reception system and resources are in place, there remain concerns on the part of stakeholders around the Directive's implementation. In particular, zealous use of provisions entitling authorities to withdraw or reduce reception conditions, under Article 20 – while not necessarily contrary to EU or Dutch law – may have deprived people of accommodation, support and access to services, where they have allegedly failed to fulfil reporting obligations, breached the rules of a reception centre, have not claimed protection at an earlier stage (potentially notwithstanding justifiable reasons for doing so). This practice has also emerged in Belgium, raising questions about the

¹⁵ European Court of Human Rights, *MSS v Belgium and Greece*, Application No. 30696/09; judgment of 21 January 2011.

minimum standards of treatment which must nonetheless be maintained to ensure respect for human rights and a dignified standard of living, pursuant to Article 20(5) and Recital 25 of the Directive.

In Germany, stakeholders fear that implementation of the Directive will lead to the reduction of standards, through selective transposition and active use of restrictive provisions, by contrast with the Directive's improvements and new safeguards. These concerns relate to reduction and withdrawal of reception conditions, but also restrictions on freedom of movement, detention in transit centres, and provision of minimal material support. It is observed that reception works well where civil society are engaged in delivering services, but in other cases, some administrations are less willing or able to provide the necessary infrastructure and support. Many citizens and entities have warmly welcomed asylum-seekers into Germany, notably when large numbers first began to come in 2015. However, growing hostile attitudes among right-wing elements to the presence of asylum-seekers, and the physical destruction of reception centres, renders the task of ensuring a smoothly-functioning and widely-supported system far more sensitive and difficult.

7. OVERARCHING REFLECTIONS

In considering the impact of the recast Reception Condition Directive in its first three years, including after the deadline for its transposition and implementation in national law¹⁶ in most Member States, a number of general conclusions and observations can be drawn, beyond the effect of individual provisions and their consequences in individual Member States.

Firstly, the collective challenges facing the EU and many Member States in the reception area in situations of large-scale arrivals can be described as an administrative, political and humanitarian crisis. However, it can also be argued this crisis is not caused by external factors alone, but stems at least in part from the failure of the EU and Member States over time to honour and enforce legislative obligations which were binding under the 2003 Directive, and under the Charter from 2009. Serious gaps in some Member States were clearly articulated by the European courts, and were widely known to all those working in the field. Prior to the recasts, some Member States sought to argue that the adoption of more ambitious standards than those articulated in the first-phase asylum *acquis* was undesirable and unfeasible because existing standards had not been met. Whilst legislative reform was being discussed intensively and widely supported by asylum experts, EU officials, UNHCR and advocates, mere 'implementation was not sexy', in the colloquial words of one expert observer.¹⁷ In hindsight, it

¹⁶ Articles 1-12, 14-28 and 30, along with Annex I, were to be transposed by 20 July 2015, according to Article 31. Articles 13 and 29 were applicable from 21 July 2015 (Article 33).

¹⁷ Statement by a senior Member State official at the German Asylum Symposium No. 24/2014, 'Vor neuen Herausforderungen oder mitten in der Krise?' (Transl.: 'Facing new challenges, or in the middle of crisis?'), Berlin, 30.6-1.7.2014.

would appear that in addition to improving standards and filling gaps in the EU reception instrument, which were undoubtedly needed, greater attention should have been devoted to applying the minimum standards which were already in place before 2013, and where necessary, addressing failures to do so through infringement action.

Second, it is apparent that the failures of the system to date, over the longer term as well as the recent past, have led to a breakdown of trust. While States have lamented the absence of a basis for 'mutual trust', enabling them to assume that others are in compliance with their obligations,¹⁸ trust is also manifestly missing from the interaction between States and asylum-seekers. Increasing numbers of people who come to the EU from countries where persecution and conflict are rife refrain from claiming in the first Member State in which they arrive. This phenomenon testifies to an absence of confidence that their international protection claims will be received and adjudicated in a swift, fair, objective and accurate way; or that they will be able to subsist in decent conditions while they are waiting for that outcome. This has been observed notably in Greece, Italy, Hungary and other countries along the EU's outer frontiers. Ironically, many asylum-seekers would appear not to trust the system and the instruments put in place to realise and safeguard their rights. Rather, a significant proportion of people prefer to assume enormous costs, risks and physical peril for themselves and their families on irregular journeys. This also entails a constant risk of apprehension and expulsion, in seeking to reach another Member State where conditions and perceptions of fair treatment are viable and in line with basic standards.

A third observation relates to notions of regulation and control. The debate around asylum in the EU over recent years has been highly charged in political terms. This is at least in part because of competing visions of political realities, of the motivations and legal status of asylum-seekers and refugees, and of the EU's core values and priorities. Many in the advocacy community support liberal ideas and notions such as freedom of movement, individuality, choices and openness to diversity. Yet in the asylum field, it may be the case that such concepts, taken to their fullest application, do not serve well the objective of well-functioning, accessible and rights-oriented asylum frameworks, including for reception. Failure to enforce and police more effective observance of rules and standards is at least a substantial part of the problem in today's EU reception picture. More predictable, orderly, well-supported arrangements for reception of asylum seekers are required across the EU. But this will necessitate greater investment in effective implementation of the Reception Conditions Directive by the EU and Member States. In early 2016, the European Commission proposed that key asylum *acquis* instruments be adopted as Regulations rather than Directives, removing the margins of interpretation and manoeuvre that currently exist when Directives are transposed and applied by Member States at national level. It is to

¹⁸ Court of Justice of the European Union (CJEU), *NS v Secretary of State for the Home Department and ME and others v Refugee Applications Commissioner and others*, Joined cases C-411/10 and C-439/10, 21 December 2011.

be hoped that this step would strengthen respect and compliance with EU standards by Member States. However, asylum-seekers will also need to respect their obligations and be prepared to engage with the systems across the EU. Linked to the debate on the future of Dublin, some might argue that more effective reception standards and fair and adequate treatment for all asylum-seekers necessitates greater readiness on the part of asylum-seekers to pursue claims and enjoy basic standards in countries which are not their ideal or aspirational destination.

8. CONCLUSION

Achieving adequate reception standards in Member States across the EU – in law, but also in practice – necessitates greater political will, investment of resources and proactivity by different levels of government. However, it also requires new and strengthened engagement by civil society, service providers, counsellors and asylum-seekers and refugees themselves. The growth in asylum-seeker numbers in many Member States, and the accompanying sense of ‘crisis’ across the EU as a whole, appears to have rendered that challenge even more demanding than in the past. However, it is a challenge that must, and can, be met. A refugee ‘crisis’ is not a situation in which the law can be qualified or disregarded. On the contrary, respect for standards and orderly, rational responses based on agreed legal norms becomes all the more important in times of significant arrival pressures and intensive political debate demand. Unilateral measures to depart from EU legislative obligations create the risk not only of undermining further trust among States, but triggering wider problems for the EU legal order, without solving the problem of how to manage desperate people who cannot go back to their homes or to drastically overstretched first countries of arrival. All those interested in refugee protection, whether they perceive it as a negative ‘burden’ or positive opportunity, have an interest in finding ways to ensure that reception systems, across the EU, can work more effectively and ensure respect for rights under international and EU law.

DIRECTIVE 2013/33/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 26 June 2013

laying down standards for the reception of applicants for international protection (recast)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,
Having regard to the Treaty on the Functioning of the European Union, and in particular Article 78(2)(f) thereof,

Having regard to the proposal from the European Commission,

Having regard to the opinion of the European Economic and Social Committee ⁽¹⁾,

Having regard to the opinion of the Committee of the Regions ⁽²⁾,

Acting in accordance with the ordinary legislative procedure ⁽³⁾,

Whereas:

- (1) A number of substantive changes are to be made to Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers ⁽⁴⁾. In the interests of clarity, that Directive should be recast.
- (2) A common policy on asylum, including a Common European Asylum System, is a constituent part of the European Union's objective of progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Union. Such a policy should be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States.
- (3) At its special meeting in Tampere on 15 and 16 October 1999, the European Council agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention Relating to the Status of Refugees of 28 July 1951, as supplemented by the New York Protocol of 31 January 1967 ('the Geneva Convention'), thus affirming the principle of *non-refoulement*. The first phase of a Common European Asylum System was achieved through the adoption of relevant legal instruments, including Directive 2003/9/EC, provided for in the Treaties.
- (4) The European Council, at its meeting of 4 November 2004, adopted The Hague Programme, which set the objectives to be implemented in the area of freedom, security and justice in the period 2005-2010. In this respect, The

Hague Programme invited the European Commission to conclude the evaluation of the first-phase instruments and to submit the second-phase instruments and measures to the European Parliament and to the Council.

- (5) The European Council, at its meeting of 10-11 December 2009, adopted the Stockholm Programme, which reiterated the commitment to the objective of establishing by 2012 a common area of protection and solidarity based on a common asylum procedure and a uniform status for those granted international protection based on high protection standards and fair and effective procedures. The Stockholm Programme further provides that it is crucial that individuals, regardless of the Member State in which their application for international protection is made, are offered an equivalent level of treatment as regards reception conditions.
- (6) The resources of the European Refugee Fund and of the European Asylum Support Office should be mobilised to provide adequate support to Member States' efforts in implementing the standards set in the second phase of the Common European Asylum System, in particular to those Member States which are faced with specific and disproportionate pressures on their asylum systems, due in particular to their geographical or demographic situation.
- (7) In the light of the results of the evaluations undertaken of the implementation of the first-phase instruments, it is appropriate, at this stage, to confirm the principles underlying Directive 2003/9/EC with a view to ensuring improved reception conditions for applicants for international protection ('applicants').
- (8) In order to ensure equal treatment of applicants throughout the Union, this Directive should apply during all stages and types of procedures concerning applications for international protection, in all locations and facilities hosting applicants and for as long as they are allowed to remain on the territory of the Member States as applicants.
- (9) In applying this Directive, Member States should seek to ensure full compliance with the principles of the best interests of the child and of family unity, in accordance with the Charter of Fundamental Rights of the European Union, the 1989 United Nations Convention on the Rights of the Child and the European Convention for the Protection of Human Rights and Fundamental Freedoms respectively.
- (10) With respect to the treatment of persons falling within the scope of this Directive, Member States are bound by obligations under instruments of international law to which they are party.
- (11) Standards for the reception of applicants that will suffice to ensure them a dignified standard of living and comparable living conditions in all Member States should be laid down.
- (12) The harmonisation of conditions for the reception of applicants should help to limit the secondary movements of applicants influenced by the variety of conditions for their reception.

With a view to ensuring equal treatment amongst all applicants for interna-

- (13) tional protection and guaranteeing consistency with current EU asylum *acquis*, in particular with Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted⁽⁵⁾, it is appropriate to extend the scope of this Directive in order to include applicants for subsidiary protection.
- (14) The reception of persons with special reception needs should be a primary concern for national authorities in order to ensure that such reception is specifically designed to meet their special reception needs.
- (15) The detention of applicants should be applied in accordance with the underlying principle that a person should not be held in detention for the sole reason that he or she is seeking international protection, particularly in accordance with the international legal obligations of the Member States and with Article 31 of the Geneva Convention. Applicants may be detained only under very clearly defined exceptional circumstances laid down in this Directive and subject to the principle of necessity and proportionality with regard to both to the manner and the purpose of such detention. Where an applicant is held in detention he or she should have effective access to the necessary procedural guarantees, such as judicial remedy before a national judicial authority.
- (16) With regard to administrative procedures relating to the grounds for detention, the notion of 'due diligence' at least requires that Member States take concrete and meaningful steps to ensure that the time needed to verify the grounds for detention is as short as possible, and that there is a real prospect that such verification can be carried out successfully in the shortest possible time. Detention shall not exceed the time reasonably needed to complete the relevant procedures.
- (17) The grounds for detention set out in this Directive are without prejudice to other grounds for detention, including detention grounds within the framework of criminal proceedings, which are applicable under national law, unrelated to the third country national's or stateless person's application for international protection.
- (18) Applicants who are in detention should be treated with full respect for human dignity and their reception should be specifically designed to meet their needs in that situation. In particular, Member States should ensure that Article 37 of the 1989 United Nations Convention on the Rights of the Child is applied.
- (19) There may be cases where it is not possible in practice to immediately ensure certain reception guarantees in detention, for example due to the geographical location or the specific structure of the detention facility. However, any derogation from those guarantees should be temporary and should only be applied under the circumstances set out in this Directive. Derogations should only be applied in exceptional circumstances and should

be duly justified, taking into consideration the circumstances of each case, including the level of severity of the derogation applied, its duration and its impact on the applicant concerned.

- (20) In order to better ensure the physical and psychological integrity of the applicants, detention should be a measure of last resort and may only be applied after all non-custodial alternative measures to detention have been duly examined. Any alternative measure to detention must respect the fundamental human rights of applicants.
- (21) In order to ensure compliance with the procedural guarantees consisting in the opportunity to contact organisations or groups of persons that provide legal assistance, information should be provided on such organisations and groups of persons.
- (22) When deciding on housing arrangements, Member States should take due account of the best interests of the child, as well as of the particular circumstances of any applicant who is dependent on family members or other close relatives such as unmarried minor siblings already present in the Member State.
- (23) In order to promote the self-sufficiency of applicants and to limit wide discrepancies between Member States, it is essential to provide clear rules on the applicants' access to the labour market.
- (24) To ensure that the material support provided to applicants complies with the principles set out in this Directive, it is necessary that Member States determine the level of such support on the basis of relevant references. That does not mean that the amount granted should be the same as for nationals. Member States may grant less favourable treatment to applicants than to nationals as specified in this Directive.
- (25) The possibility of abuse of the reception system should be restricted by specifying the circumstances in which material reception conditions for applicants may be reduced or withdrawn while at the same time ensuring a dignified standard of living for all applicants.
- (26) The efficiency of national reception systems and cooperation among Member States in the field of reception of applicants should be secured.
- (27) Appropriate coordination should be encouraged between the competent authorities as regards the reception of applicants, and harmonious relationships between local communities and accommodation centres should therefore be promoted.
- (28) Member States should have the power to introduce or maintain more favourable provisions for third-country nationals and stateless persons who ask for international protection from a Member State.
- (29) In this spirit, Member States are also invited to apply the provisions of this Directive in connection with procedures for deciding on applications for forms of protection other than that provided for under Directive 2011/95/EU.

- (30) The implementation of this Directive should be evaluated at regular intervals.
- (31) Since the objective of this Directive, namely to establish standards for the reception of applicants in Member States, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of this Directive, be better achieved at the Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union (TEU). In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.
- (32) In accordance with the Joint Political Declaration of Member States and the Commission on explanatory documents of 28 September 2011 ⁽⁶⁾, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.
- (33) In accordance with Articles 1 and 2 and Article 4a(1) of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the TEU, and to the Treaty on the Functioning of the European Union (TFEU), and without prejudice to Article 4 of that Protocol, the United Kingdom and Ireland are not taking part in the adoption of this Directive and are not bound by it or subject to its application.
- (34) In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the TEU and to the TFEU, Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application.
- (35) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for human dignity and to promote the application of Articles 1, 4, 6, 7, 18, 21, 24 and 47 of the Charter and has to be implemented accordingly.
- (36) The obligation to transpose this Directive into national law should be confined to those provisions which represent a substantive change as compared with Directive 2003/9/EC. The obligation to transpose the provisions which are unchanged arises under that Directive.
- (37) This Directive should be without prejudice to the obligations of the Member States relating to the time-limit for transposition into national law of Directive 2003/9/EC set out in Annex II, Part B,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

PURPOSE, DEFINITIONS AND SCOPE

Article 1

Purpose

The purpose of this Directive is to lay down standards for the reception of applicants for international protection ('applicants') in Member States.

Article 2

Definitions

For the purposes of this Directive:

- (a) 'application for international protection': means an application for international protection as defined in Article 2(h) of Directive 2011/95/EU;
- (b) 'applicant': means a third-country national or a stateless person who has made an application for international protection in respect of which a final decision has not yet been taken;
- (c) 'family members': means, in so far as the family already existed in the country of origin, the following members of the applicant's family who are present in the same Member State in relation to the application for international protection:
 - the spouse of the applicant or his or her unmarried partner in a stable relationship, where the law or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to third-country nationals;
 - the minor children of couples referred to in the first indent or of the applicant, on condition that they are unmarried and regardless of whether they were born in or out of wedlock or adopted as defined under national law;
 - the father, mother or another adult responsible for the applicant whether by law or by the practice of the Member State concerned, when that applicant is a minor and unmarried;
- (d) 'minor': means a third-country national or stateless person below the age of 18 years;
- (e) 'unaccompanied minor': means a minor who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such a person; it includes a minor who is left unaccompanied after he or she has entered the territory of the Member States;

- (f) 'reception conditions': means the full set of measures that Member States grant to applicants in accordance with this Directive;
- (g) 'material reception conditions': means the reception conditions that include housing, food and clothing provided in kind, or as financial allowances or in vouchers, or a combination of the three, and a daily expenses allowance;
- (h) 'detention': means confinement of an applicant by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement;
- (i) 'accommodation centre': means any place used for the collective housing of applicants;
- (j) 'representative': means a person or an organisation appointed by the competent bodies in order to assist and represent an unaccompanied minor in procedures provided for in this Directive with a view to ensuring the best interests of the child and exercising legal capacity for the minor where necessary. Where an organisation is appointed as a representative, it shall designate a person responsible for carrying out the duties of representative in respect of the unaccompanied minor, in accordance with this Directive;
- (k) 'applicant with special reception needs': means a vulnerable person, in accordance with Article 21, who is in need of special guarantees in order to benefit from the rights and comply with the obligations provided for in this Directive.

Article 3

Scope

1. This Directive shall apply to all third-country nationals and stateless persons who make an application for international protection on the territory, including at the border, in the territorial waters or in the transit zones of a Member State, as long as they are allowed to remain on the territory as applicants, as well as to family members, if they are covered by such application for international protection according to national law.
2. This Directive shall not apply in cases of requests for diplomatic or territorial asylum submitted to representations of Member States.
3. This Directive shall not apply when the provisions of Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof⁽⁷⁾ are applied.
4. Member States may decide to apply this Directive in connection with procedures for deciding on applications for kinds of protection other than that emanating from Directive 2011/95/EU.

Article 4

More favourable provisions

Member States may introduce or retain more favourable provisions in the field of reception conditions for applicants and other close relatives of the applicant who are present in the same Member State when they are dependent on him or her, or for humanitarian reasons, insofar as these provisions are compatible with this Directive.

CHAPTER II

GENERAL PROVISIONS ON RECEPTION CONDITIONS

Article 5

Information

1. Member States shall inform applicants, within a reasonable time not exceeding 15 days after they have lodged their application for international protection, of at least any established benefits and of the obligations with which they must comply relating to reception conditions.

Member States shall ensure that applicants are provided with information on organisations or groups of persons that provide specific legal assistance and organisations that might be able to help or inform them concerning the available reception conditions, including health care.

2. Member States shall ensure that the information referred to in paragraph 1 is in writing and, in a language that the applicant understands or is reasonably supposed to understand. Where appropriate, this information may also be supplied orally.

Article 6

Documentation

1. Member States shall ensure that, within three days of the lodging of an application for international protection, the applicant is provided with a document issued in his or her own name certifying his or her status as an applicant or testifying that he or she is allowed to stay on the territory of the Member State while his or her application is pending or being examined.

If the holder is not free to move within all or a part of the territory of the Member State, the document shall also certify that fact.

2. Member States may exclude application of this Article when the applicant is in detention and during the examination of an application for international protection made at the border or within the context of a procedure to decide on the right of the applicant to enter the territory of a Member State. In specific cases, during the examination of an application for international protection, Member States may provide applicants with other evidence equivalent to the document referred to in paragraph 1.

3. The document referred to in paragraph 1 need not certify the identity of the applicant.
4. Member States shall adopt the necessary measures to provide applicants with the document referred to in paragraph 1, which must be valid for as long as they are authorised to remain on the territory of the Member State concerned.
5. Member States may provide applicants with a travel document when serious humanitarian reasons arise that require their presence in another State.
6. Member States shall not impose unnecessary or disproportionate documentation or other administrative requirements on applicants before granting them the rights to which they are entitled under this Directive for the sole reason that they are applicants for international protection.

Article 7

Residence and freedom of movement

1. Applicants may move freely within the territory of the host Member State or within an area assigned to them by that Member State. The assigned area shall not affect the unalienable sphere of private life and shall allow sufficient scope for guaranteeing access to all benefits under this Directive.
2. Member States may decide on the residence of the applicant for reasons of public interest, public order or, when necessary, for the swift processing and effective monitoring of his or her application for international protection.
3. Member States may make provision of the material reception conditions subject to actual residence by the applicants in a specific place, to be determined by the Member States. Such a decision, which may be of a general nature, shall be taken individually and established by national law.
4. Member States shall provide for the possibility of granting applicants temporary permission to leave the place of residence mentioned in paragraphs 2 and 3 and/or the assigned area mentioned in paragraph 1. Decisions shall be taken individually, objectively and impartially and reasons shall be given if they are negative.

The applicant shall not require permission to keep appointments with authorities and courts if his or her appearance is necessary.

5. Member States shall require applicants to inform the competent authorities of their current address and notify any change of address to such authorities as soon as possible.

Article 8

Detention

1. Member States shall not hold a person in detention for the sole reason that he or she is an applicant in accordance with Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection ⁽⁸⁾.
2. When it proves necessary and on the basis of an individual assessment of each case, Member States may detain an applicant, if other less coercive alternative measures cannot be applied effectively.
3. An applicant may be detained only:
 - (a) in order to determine or verify his or her identity or nationality;
 - (b) in order to determine those elements on which the application for international protection is based which could not be obtained in the absence of detention, in particular when there is a risk of absconding of the applicant;
 - (c) in order to decide, in the context of a procedure, on the applicant's right to enter the territory;
 - (d) when he or she is detained subject to a return procedure under Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals ⁽⁹⁾, in order to prepare the return and/or carry out the removal process, and the Member State concerned can substantiate on the basis of objective criteria, including that he or she already had the opportunity to access the asylum procedure, that there are reasonable grounds to believe that he or she is making the application for international protection merely in order to delay or frustrate the enforcement of the return decision;
 - (e) when protection of national security or public order so requires;
 - (f) in accordance with Article 28 of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person ⁽¹⁰⁾.

The grounds for detention shall be laid down in national law.

4. Member States shall ensure that the rules concerning alternatives to detention, such as regular reporting to the authorities, the deposit of a financial guarantee, or an obligation to stay at an assigned place, are laid down in national law.

Article 9

Guarantees for detained applicants

1. An applicant shall be detained only for as short a period as possible and shall be kept in detention only for as long as the grounds set out in Article 8(3) are applicable.

Administrative procedures relevant to the grounds for detention set out in Article 8(3) shall be executed with due diligence. Delays in administrative procedures that cannot be attributed to the applicant shall not justify a continuation of detention.

2. Detention of applicants shall be ordered in writing by judicial or administrative authorities. The detention order shall state the reasons in fact and in law on which it is based.

3. Where detention is ordered by administrative authorities, Member States shall provide for a speedy judicial review of the lawfulness of detention to be conducted *ex officio* and/or at the request of the applicant. When conducted *ex officio*, such review shall be decided on as speedily as possible from the beginning of detention. When conducted at the request of the applicant, it shall be decided on as speedily as possible after the launch of the relevant proceedings. To this end, Member States shall define in national law the period within which the judicial review *ex officio* and/or the judicial review at the request of the applicant shall be conducted.

Where, as a result of the judicial review, detention is held to be unlawful, the applicant concerned shall be released immediately.

4. Detained applicants shall immediately be informed in writing, in a language which they understand or are reasonably supposed to understand, of the reasons for detention and the procedures laid down in national law for challenging the detention order, as well as of the possibility to request free legal assistance and representation.

5. Detention shall be reviewed by a judicial authority at reasonable intervals of time, *ex officio* and/or at the request of the applicant concerned, in particular whenever it is of a prolonged duration, relevant circumstances arise or new information becomes available which may affect the lawfulness of detention.

6. In cases of a judicial review of the detention order provided for in paragraph 3, Member States shall ensure that applicants have access to free legal assistance and representation. This shall include, at least, the preparation of the required procedural documents and participation in the hearing before the judicial authorities on behalf of the applicant.

Free legal assistance and representation shall be provided by suitably qualified persons as admitted or permitted under national law whose interests do not conflict or could not potentially conflict with those of the applicant.

7. Member States may also provide that free legal assistance and representation are granted:

- (a) only to those who lack sufficient resources; and/or
 - (b) only through the services provided by legal advisers or other counsellors specifically designated by national law to assist and represent applicants.
8. Member States may also:
- (a) impose monetary and/or time limits on the provision of free legal assistance and representation, provided that such limits do not arbitrarily restrict access to legal assistance and representation;
 - (b) provide that, as regards fees and other costs, the treatment of applicants shall not be more favourable than the treatment generally accorded to their nationals in matters pertaining to legal assistance.
9. Member States may demand to be reimbursed wholly or partially for any costs granted if and when the applicant's financial situation has improved considerably or if the decision to grant such costs was taken on the basis of false information supplied by the applicant.
10. Procedures for access to legal assistance and representation shall be laid down in national law.

Article 10

Conditions of detention

1. Detention of applicants shall take place, as a rule, in specialised detention facilities. Where a Member State cannot provide accommodation in a specialised detention facility and is obliged to resort to prison accommodation, the detained applicant shall be kept separately from ordinary prisoners and the detention conditions provided for in this Directive shall apply.

As far as possible, detained applicants shall be kept separately from other third-country nationals who have not lodged an application for international protection.

When applicants cannot be detained separately from other third-country nationals, the Member State concerned shall ensure that the detention conditions provided for in this Directive are applied.

- 2. Detained applicants shall have access to open-air spaces.
- 3. Member States shall ensure that persons representing the United Nations High Commissioner for Refugees (UNHCR) have the possibility to communicate with and visit applicants in conditions that respect privacy. That possibility shall also apply to an organisation which is working on the territory of the Member State concerned on behalf of UNHCR pursuant to an agreement with that Member State.
- 4. Member States shall ensure that family members, legal advisers or counsellors and persons representing relevant non-governmental organisations recognised by the Member State concerned have the possibility to communicate with and visit applicants in conditions that respect privacy. Limits to access to the

detention facility may be imposed only where, by virtue of national law, they are objectively necessary for the security, public order or administrative management of the detention facility, provided that access is not thereby severely restricted or rendered impossible.

5. Member States shall ensure that applicants in detention are systematically provided with information which explains the rules applied in the facility and sets out their rights and obligations in a language which they understand or are reasonably supposed to understand. Member States may derogate from this obligation in duly justified cases and for a reasonable period which shall be as short as possible, in the event that the applicant is detained at a border post or in a transit zone. This derogation shall not apply in cases referred to in Article 43 of Directive 2013/32/EU.

Article 11

Detention of vulnerable persons and of applicants with special reception needs

1. The health, including mental health, of applicants in detention who are vulnerable persons shall be of primary concern to national authorities.

Where vulnerable persons are detained, Member States shall ensure regular monitoring and adequate support taking into account their particular situation, including their health.

2. Minors shall be detained only as a measure of last resort and after it having been established that other less coercive alternative measures cannot be applied effectively. Such detention shall be for the shortest period of time and all efforts shall be made to release the detained minors and place them in accommodation suitable for minors.

The minor's best interests, as prescribed in Article 23(2), shall be a primary consideration for Member States.

Where minors are detained, they shall have the possibility to engage in leisure activities, including play and recreational activities appropriate to their age.

3. Unaccompanied minors shall be detained only in exceptional circumstances. All efforts shall be made to release the detained unaccompanied minor as soon as possible.

Unaccompanied minors shall never be detained in prison accommodation.

As far as possible, unaccompanied minors shall be provided with accommodation in institutions provided with personnel and facilities which take into account the needs of persons of their age.

Where unaccompanied minors are detained, Member States shall ensure that they are accommodated separately from adults.

4. Detained families shall be provided with separate accommodation guaranteeing adequate privacy.

5. Where female applicants are detained, Member States shall ensure that they are accommodated separately from male applicants, unless the latter are family members and all individuals concerned consent thereto.

Exceptions to the first subparagraph may also apply to the use of common spaces designed for recreational or social activities, including the provision of meals.

6. In duly justified cases and for a reasonable period that shall be as short as possible Member States may derogate from the third subparagraph of paragraph 2, paragraph 4 and the first subparagraph of paragraph 5, when the applicant is detained at a border post or in a transit zone, with the exception of the cases referred to in Article 43 of Directive 2013/32/EU.

Article 12

Families

Member States shall take appropriate measures to maintain as far as possible family unity as present within their territory, if applicants are provided with housing by the Member State concerned. Such measures shall be implemented with the applicant's agreement.

Article 13

Medical screening

Member States may require medical screening for applicants on public health grounds.

Article 14

Schooling and education of minors

1. Member States shall grant to minor children of applicants and to applicants who are minors access to the education system under similar conditions as their own nationals for so long as an expulsion measure against them or their parents is not actually enforced. Such education may be provided in accommodation centres.

The Member State concerned may stipulate that such access must be confined to the State education system.

Member States shall not withdraw secondary education for the sole reason that the minor has reached the age of majority.

2. Access to the education system shall not be postponed for more than three months from the date on which the application for international protection was lodged by or on behalf of the minor.

Preparatory classes, including language classes, shall be provided to minors where it is necessary to facilitate their access to and participation in the education system as set out in paragraph 1.

3. Where access to the education system as set out in paragraph 1 is not possible due to the specific situation of the minor, the Member State concerned shall offer other education arrangements in accordance with its national law and practice.

Article 15

Employment

1. Member States shall ensure that applicants have access to the labour market no later than 9 months from the date when the application for international protection was lodged if a first instance decision by the competent authority has not been taken and the delay cannot be attributed to the applicant.

2. Member States shall decide the conditions for granting access to the labour market for the applicant, in accordance with their national law, while ensuring that applicants have effective access to the labour market.

For reasons of labour market policies, Member States may give priority to Union citizens and nationals of States parties to the Agreement on the European Economic Area, and to legally resident third-country nationals.

3. Access to the labour market shall not be withdrawn during appeals procedures, where an appeal against a negative decision in a regular procedure has suspensive effect, until such time as a negative decision on the appeal is notified.

Article 16

Vocational training

Member States may allow applicants access to vocational training irrespective of whether they have access to the labour market.

Access to vocational training relating to an employment contract shall depend on the extent to which the applicant has access to the labour market in accordance with Article 15.

Article 17

General rules on material reception conditions and health care

1. Member States shall ensure that material reception conditions are available to applicants when they make their application for international protection.

2. Member States shall ensure that material reception conditions provide an adequate standard of living for applicants, which guarantees their subsistence and protects their physical and mental health.

Member States shall ensure that that standard of living is met in the specific situation of vulnerable persons, in accordance with Article 21, as well as in relation to the situation of persons who are in detention.

3. Member States may make the provision of all or some of the material reception conditions and health care subject to the condition that applicants do not

have sufficient means to have a standard of living adequate for their health and to enable their subsistence.

4. Member States may require applicants to cover or contribute to the cost of the material reception conditions and of the health care provided for in this Directive, pursuant to the provision of paragraph 3, if the applicants have sufficient resources, for example if they have been working for a reasonable period of time.

If it transpires that an applicant had sufficient means to cover material reception conditions and health care at the time when those basic needs were being covered, Member States may ask the applicant for a refund.

5. Where Member States provide material reception conditions in the form of financial allowances or vouchers, the amount thereof shall be determined on the basis of the level(s) established by the Member State concerned either by law or by the practice to ensure adequate standards of living for nationals. Member States may grant less favourable treatment to applicants compared with nationals in this respect, in particular where material support is partially provided in kind or where those level(s), applied for nationals, aim to ensure a standard of living higher than that prescribed for applicants under this Directive.

Article 18

Modalities for material reception conditions

1. Where housing is provided in kind, it should take one or a combination of the following forms:

- (a) premises used for the purpose of housing applicants during the examination of an application for international protection made at the border or in transit zones;
- (b) accommodation centres which guarantee an adequate standard of living;
- (c) private houses, flats, hotels or other premises adapted for housing applicants.

2. Without prejudice to any specific conditions of detention as provided for in Articles 10 and 11, in relation to housing referred to in paragraph 1(a), (b) and (c) of this Article Member States shall ensure that:

- (a) applicants are guaranteed protection of their family life;
- (b) applicants have the possibility of communicating with relatives, legal advisers or counsellors, persons representing UNHCR and other relevant national, international and non-governmental organisations and bodies;
- (c) family members, legal advisers or counsellors, persons representing UNHCR and relevant non-governmental organisations recognised by the Member State concerned are granted access in order to assist the applicants. Limits on such access may be imposed only on grounds relating to the security of the premises and of the applicants.

3. Member States shall take into consideration gender and age-specific concerns and the situation of vulnerable persons in relation to applicants within the premises and accommodation centres referred to in paragraph 1(a) and (b).
4. Member States shall take appropriate measures to prevent assault and gender-based violence, including sexual assault and harassment, within the premises and accommodation centres referred to in paragraph 1(a) and (b).
5. Member States shall ensure, as far as possible, that dependent adult applicants with special reception needs are accommodated together with close adult relatives who are already present in the same Member State and who are responsible for them whether by law or by the practice of the Member State concerned.
6. Member States shall ensure that transfers of applicants from one housing facility to another take place only when necessary. Member States shall provide for the possibility for applicants to inform their legal advisers or counsellors of the transfer and of their new address.
7. Persons working in accommodation centres shall be adequately trained and shall be bound by the confidentiality rules provided for in national law in relation to any information they obtain in the course of their work.
8. Member States may involve applicants in managing the material resources and non-material aspects of life in the centre through an advisory board or council representing residents.
9. In duly justified cases, Member States may exceptionally set modalities for material reception conditions different from those provided for in this Article, for a reasonable period which shall be as short as possible, when:
 - (a) an assessment of the specific needs of the applicant is required, in accordance with Article 22;
 - (b) housing capacities normally available are temporarily exhausted.Such different conditions shall in any event cover basic needs.

Article 19

Health care

1. Member States shall ensure that applicants receive the necessary health care which shall include, at least, emergency care and essential treatment of illnesses and of serious mental disorders.
2. Member States shall provide necessary medical or other assistance to applicants who have special reception needs, including appropriate mental health care where needed.

CHAPTER III

REDUCTION OR WITHDRAWAL OF MATERIAL RECEPTION CONDITIONS

Article 20

Reduction or withdrawal of material reception conditions

1. Member States may reduce or, in exceptional and duly justified cases, withdraw material reception conditions where an applicant:
 - (a) abandons the place of residence determined by the competent authority without informing it or, if requested, without permission; or
 - (b) does not comply with reporting duties or with requests to provide information or to appear for personal interviews concerning the asylum procedure during a reasonable period laid down in national law; or
 - (c) has lodged a subsequent application as defined in Article 2(q) of Directive 2013/32/EU.

In relation to cases (a) and (b), when the applicant is traced or voluntarily reports to the competent authority, a duly motivated decision, based on the reasons for the disappearance, shall be taken on the reinstallation of the grant of some or all of the material reception conditions withdrawn or reduced.

2. Member States may also reduce material reception conditions when they can establish that the applicant, for no justifiable reason, has not lodged an application for international protection as soon as reasonably practicable after arrival in that Member State.
3. Member States may reduce or withdraw material reception conditions where an applicant has concealed financial resources, and has therefore unduly benefited from material reception conditions.
4. Member States may determine sanctions applicable to serious breaches of the rules of the accommodation centres as well as to seriously violent behaviour.
5. Decisions for reduction or withdrawal of material reception conditions or sanctions referred to in paragraphs 1, 2, 3 and 4 of this Article shall be taken individually, objectively and impartially and reasons shall be given. Decisions shall be based on the particular situation of the person concerned, especially with regard to persons covered by Article 21, taking into account the principle of proportionality. Member States shall under all circumstances ensure access to health care in accordance with Article 19 and shall ensure a dignified standard of living for all applicants.
6. Member States shall ensure that material reception conditions are not withdrawn or reduced before a decision is taken in accordance with paragraph 5.

CHAPTER IV

PROVISIONS FOR VULNERABLE PERSONS

Article 21

General principle

Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation, in the national law implementing this Directive.

Article 22

Assessment of the special reception needs of vulnerable persons

1. In order to effectively implement Article 21, Member States shall assess whether the applicant is an applicant with special reception needs. Member States shall also indicate the nature of such needs.

That assessment shall be initiated within a reasonable period of time after an application for international protection is made and may be integrated into existing national procedures. Member States shall ensure that those special reception needs are also addressed, in accordance with the provisions of this Directive, if they become apparent at a later stage in the asylum procedure.

Member States shall ensure that the support provided to applicants with special reception needs in accordance with this Directive takes into account their special reception needs throughout the duration of the asylum procedure and shall provide for appropriate monitoring of their situation.

2. The assessment referred to in paragraph 1 need not take the form of an administrative procedure.

3. Only vulnerable persons in accordance with Article 21 may be considered to have special reception needs and thus benefit from the specific support provided in accordance with this Directive.

4. The assessment provided for in paragraph 1 shall be without prejudice to the assessment of international protection needs pursuant to Directive 2011/95/EU.

Article 23

Minors

1. The best interests of the child shall be a primary consideration for Member States when implementing the provisions of this Directive that involve minors. Member States shall ensure a standard of living adequate for the minor's physical, mental, spiritual, moral and social development.

2. In assessing the best interests of the child, Member States shall in particular take due account of the following factors:

- (a) family reunification possibilities;
- (b) the minor's well-being and social development, taking into particular consideration the minor's background;
- (c) safety and security considerations, in particular where there is a risk of the minor being a victim of human trafficking;
- (d) the views of the minor in accordance with his or her age and maturity.

3. Member States shall ensure that minors have access to leisure activities, including play and recreational activities appropriate to their age within the premises and accommodation centres referred to in Article 18(1)(a) and (b) and to open-air activities.

4. Member States shall ensure access to rehabilitation services for minors who have been victims of any form of abuse, neglect, exploitation, torture or cruel, inhuman and degrading treatment, or who have suffered from armed conflicts, and ensure that appropriate mental health care is developed and qualified counselling is provided when needed.

5. Member States shall ensure that minor children of applicants or applicants who are minors are lodged with their parents, their unmarried minor siblings or with the adult responsible for them whether by law or by the practice of the Member State concerned, provided it is in the best interests of the minors concerned.

Article 24

Unaccompanied minors

1. Member States shall as soon as possible take measures to ensure that a representative represents and assists the unaccompanied minor to enable him or her to benefit from the rights and comply with the obligations provided for in this Directive. The unaccompanied minor shall be informed immediately of the appointment of the representative. The representative shall perform his or her duties in accordance with the principle of the best interests of the child, as prescribed in Article 23(2), and shall have the necessary expertise to that end. In order to ensure the minor's well-being and social development referred to in Article 23(2)(b), the person acting as representative shall be changed only when necessary. Organisations or individuals whose interests conflict or could potentially conflict with those of the unaccompanied minor shall not be eligible to become representatives.

Regular assessments shall be made by the appropriate authorities, including as regards the availability of the necessary means for representing the unaccompanied minor.

2. Unaccompanied minors who make an application for international protection shall, from the moment they are admitted to the territory until the moment

when they are obliged to leave the Member State in which the application for international protection was made or is being examined, be placed:

- (a) with adult relatives;
- (b) with a foster family;
- (c) in accommodation centres with special provisions for minors;
- (d) in other accommodation suitable for minors.

Member States may place unaccompanied minors aged 16 or over in accommodation centres for adult applicants, if it is in their best interests, as prescribed in Article 23(2).

As far as possible, siblings shall be kept together, taking into account the best interests of the minor concerned and, in particular, his or her age and degree of maturity. Changes of residence of unaccompanied minors shall be limited to a minimum.

3. Member States shall start tracing the members of the unaccompanied minor's family, where necessary with the assistance of international or other relevant organisations, as soon as possible after an application for international protection is made, whilst protecting his or her best interests. In cases where there may be a threat to the life or integrity of the minor or his or her close relatives, particularly if they have remained in the country of origin, care must be taken to ensure that the collection, processing and circulation of information concerning those persons is undertaken on a confidential basis, so as to avoid jeopardising their safety.

4. Those working with unaccompanied minors shall have had and shall continue to receive appropriate training concerning their needs, and shall be bound by the confidentiality rules provided for in national law, in relation to any information they obtain in the course of their work.

Article 25

Victims of torture and violence

1. Member States shall ensure that persons who have been subjected to torture, rape or other serious acts of violence receive the necessary treatment for the damage caused by such acts, in particular access to appropriate medical and psychological treatment or care.

2. Those working with victims of torture, rape or other serious acts of violence shall have had and shall continue to receive appropriate training concerning their needs, and shall be bound by the confidentiality rules provided for in national law, in relation to any information they obtain in the course of their work.

CHAPTER V

APPEALS

Article 26

Appeals

1. Member States shall ensure that decisions relating to the granting, withdrawal or reduction of benefits under this Directive or decisions taken under Article 7 which affect applicants individually may be the subject of an appeal within the procedures laid down in national law. At least in the last instance the possibility of an appeal or a review, in fact and in law, before a judicial authority shall be granted.

2. In cases of an appeal or a review before a judicial authority referred to in paragraph 1, Member States shall ensure that free legal assistance and representation is made available on request in so far as such aid is necessary to ensure effective access to justice. This shall include, at least, the preparation of the required procedural documents and participation in the hearing before the judicial authorities on behalf of the applicant.

Free legal assistance and representation shall be provided by suitably qualified persons, as admitted or permitted under national law, whose interests do not conflict or could not potentially conflict with those of the applicant.

3. Member States may also provide that free legal assistance and representation are granted:

- (a) only to those who lack sufficient resources; and/or
- (b) only through the services provided by legal advisers or other counsellors specifically designated by national law to assist and represent applicants.

Member States may provide that free legal assistance and representation not be made available if the appeal or review is considered by a competent authority to have no tangible prospect of success. In such a case, Member States shall ensure that legal assistance and representation is not arbitrarily restricted and that the applicant's effective access to justice is not hindered.

4. Member States may also:

- (a) impose monetary and/or time limits on the provision of free legal assistance and representation, provided that such limits do not arbitrarily restrict access to legal assistance and representation;
- (b) provide that, as regards fees and other costs, the treatment of applicants shall not be more favorable than the treatment generally accorded to their nationals in matters pertaining to legal assistance.

5. Member States may demand to be reimbursed wholly or partially for any costs granted if and when the applicant's financial situation has improved considerably or if the decision to grant such costs was taken on the basis of false information supplied by the applicant.

6. Procedures for access to legal assistance and representation shall be laid down in national law.

CHAPTER VI

ACTIONS TO IMPROVE THE EFFICIENCY OF THE RECEPTION SYSTEM

Article 27

Competent authorities

Each Member State shall notify the Commission of the authorities responsible for fulfilling the obligations arising under this Directive. Member States shall inform the Commission of any changes in the identity of such authorities.

Article 28

Guidance, monitoring and control system

1. Member States shall, with due respect to their constitutional structure, put in place relevant mechanisms in order to ensure that appropriate guidance, monitoring and control of the level of reception conditions are established.
2. Member States shall submit relevant information to the Commission in the form set out in Annex I, by 20 July 2016 at the latest.

Article 29

Staff and resources

1. Member States shall take appropriate measures to ensure that authorities and other organisations implementing this Directive have received the necessary basic training with respect to the needs of both male and female applicants.
2. Member States shall allocate the necessary resources in connection with the national law implementing this Directive.

CHAPTER VII

FINAL PROVISIONS

Article 30

Reports

By 20 July 2017 at the latest, the Commission shall report to the European Parliament and the Council on the application of this Directive and shall propose any amendments that are necessary.

Member States shall send the Commission all the information that is appropriate for drawing up the report by 20 July 2016.

After presenting the first report, the Commission shall report to the European Parliament and the Council on the application of this Directive at least every five years.

Article 31

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with Articles 1 to 12, 14 to 28 and 30 and Annex I by 20 July 2015 at the latest. They shall forthwith communicate to the Commission the text of those measures.

When Member States adopt those measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. They shall also include a statement that references in existing laws, regulations and administrative provisions to the directive repealed by this Directive shall be construed as references to this Directive. Member States shall determine how such reference is to be made and how that statement is to be formulated.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 32

Repeal

Directive 2003/9/EC is repealed for the Member States bound by this Directive with effect from 21 July 2015, without prejudice to the obligations of the Member States relating to the time-limit for transposition into national law of the Directive set out in Annex II, Part B.

References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex III.

Article 33

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Articles 13 and 29 shall apply from 21 July 2015.

Article 34

Addressees

This Directive is addressed to the Member States in accordance with the Treaties.

Done at Brussels, 26 June 2013.

For the European Parliament

The President

M. SCHULZ

For the Council

The President

A. SHATTER

(¹) OJ C 317, 23.12.2009, p. 110 and OJ C 24, 28.1.2012, p. 80.

(²) OJ C 79, 27.3.2010, p. 58.

(³) Position of the European Parliament of 7 May 2009 (OJ C 212 E, 5.8.2010, p. 348) and position of the Council at first reading of 6 June 2013 (not yet published in the Official Journal). Position of the European Parliament of 10 June 2013 (not yet published in the Official Journal).

(⁴) OJ L 31, 6.2.2003, p. 18.

(⁵) OJ L 337, 20.12.2011, p. 9.

(⁶) OJ C 369, 17.12.2011, p. 14.

(⁷) OJ L 212, 7.8.2001, p. 12.

(⁸) See page 60 of this Official Journal.

(⁹) OJ L 348, 24.12.2008, p. 98.

(¹⁰) See page 31 of this Official Journal.

ANNEX I

Reporting form on the information to be submitted by Member States, as required under Article 28(2)

After the date referred to in Article 28(2), the information to be submitted by Member States shall be re-submitted to the Commission when there is a substantial change in the national law or practice that supersedes the information provided.

1. On the basis of Articles 2(k) and 22, please explain the different steps for the identification of persons with special reception needs, including the moment when it is triggered and its consequences in relation to addressing such needs, in particular for unaccompanied minors, victims of torture, rape or other serious forms of psychological, physical or sexual violence and victims of human trafficking.
 2. Provide full information on the type, name and format of the documents provided for in Article 6.
 3. With reference to Article 15, please indicate the extent to which any particular conditions are attached to labour market access for applicants, and describe such restrictions in detail.
 4. With reference to Article 2(g), please describe how material reception conditions are provided (i.e. which material reception conditions are provided in kind, in money, in vouchers or in a combination of those elements) and indicate the level of the daily expenses allowance provided to applicants.
 5. Where applicable, with reference to Article 17(5), please explain the point(s) of reference applied by national law or practice with a view to determining the level of financial assistance provided to applicants. To the extent that there is less favourable treatment of applicants compared with nationals, explain the reasons for it.
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ANNEX II

PART A

Repealed Directive

(referred to in Article 32)

| | |
|-----------------------------|-----------------------------|
| Council Directive 2003/9/EC | (OJ L 31, 6.2.2003, p. 18). |
|-----------------------------|-----------------------------|

PART B

Time-limit for transposition into national law

(referred to in Article 32)

| Directive | Time-limit for transposition |
|-----------|------------------------------|
| 2003/9/EC | 6 February 2005 |

ANNEX III**Correlation Table**

| Directive 2003/9/EC | This Directive |
|------------------------------------|------------------------------------|
| Article 1 | Article 1 |
| Article 2, introductory wording | Article 2, introductory wording |
| Article 2(a) | — |
| Article 2(b) | — |
| — | Article 2(a) |
| Article 2(c) | Article 2(b) |
| Article 2(d), introductory wording | Article 2(c), introductory wording |
| Article 2(d)(i) | Article 2(c), first indent |
| Article 2(d)(ii) | Article 2(c), second indent |
| — | Article 2(c), third indent |
| Article 2(e), (f) and (g) | — |
| — | Article 2(d) |
| Article 2(h) | Article 2(e) |
| Article 2(i) | Article 2(f) |
| Article 2(j) | Article 2(g) |
| Article 2(k) | Article 2(h) |
| Article 2(l) | Article 2(i) |
| — | Article 2(j) |
| — | Article 2(k) |
| Article 3 | Article 3 |
| Article 4 | Article 4 |
| Article 5 | Article 5 |
| Article 6(1) to (5) | Article 6(1) to (5) |
| — | Article 6(6) |
| Article 7(1) and (2) | Article 7(1) and (2) |
| Article 7(3) | — |
| Article 7(4) to (6) | Article 7(3) to (5) |

| | |
|---|---|
| — | Article 8 |
| — | Article 9 |
| — | Article 10 |
| — | Article 11 |
| Article 8 | Article 12 |
| Article 9 | Article 13 |
| Article 10(1) | Article 14(1) |
| Article 10(2) | Article 14(2), first subparagraph |
| — | Article 14(2), second subparagraph |
| Article 10(3) | Article 14(3) |
| Article 11(1) | — |
| — | Article 15(1) |
| Article 11(2) | Article 15(2) |
| Article 11(3) | Article 15(3) |
| Article 11(4) | — |
| Article 12 | Article 16 |
| Article 13(1) to (4) | Article 17(1) to (4) |
| Article 13(5) | — |
| — | Article 17(5) |
| Article 14(1) | Article 18(1) |
| Article 14(2), first subparagraph, introductory wording, points (a) and (b) | Article 18(2), introductory wording, points (a) and (b) |
| Article 14(7) | Article 18(2)(c) |
| — | Article 18(3) |
| Article 14(2), second subparagraph | Article 18(4) |
| Article 14(3) | — |
| — | Article 18(5) |
| Article 14(4) | Article 18(6) |
| Article 14(5) | Article 18(7) |
| Article 14(6) | Article 18(8) |

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| | |
|---|--|
| Article 14(8), first subparagraph, introductory wording, first indent | Article 18(9), first subparagraph, introductory wording, point (a) |
| Article 14(8), first subparagraph, second indent | — |
| Article 14(8), first subparagraph, third indent | Article 18(9), first subparagraph, point (b) |
| Article 14(8), first subparagraph, fourth indent | — |
| Article 14(8), second subparagraph | Article 18(9), second subparagraph |
| Article 15 | Article 19 |
| Article 16(1), introductory wording | Article 20(1), introductory wording |
| Article 16(1)(a), first subparagraph, first, second and third indents | Article 20(1), first subparagraph, points (a), (b) and (c) |
| Article 16(1)(a), second subparagraph | Article 20(1), second subparagraph |
| Article 16(1)(b) | — |
| Article 16(2) | — |
| — | Article 20(2) and (3) |
| Article 16(3) to (5) | Article 20(4) to (6) |
| Article 17(1) | Article 21 |
| Article 17(2) | — |
| — | Article 22 |
| Article 18(1) | Article 23(1) |
| — | Article 23(2) and (3) |
| Article 18(2) | Article 23(4) |
| — | Article 23(5) |
| Article 19 | Article 24 |
| Article 20 | Article 25(1) |
| — | Article 25(2) |
| Article 21(1) | Article 26(1) |
| — | Article 26(2) to (5) |
| Article 21(2) | Article 26(6) |
| Article 22 | — |

DIRECTIVE 2013/33/EU

| | |
|------------|---------------------------------|
| — | Article 27 |
| Article 23 | Article 28(1) |
| — | Article 28(2) |
| Article 24 | Article 29 |
| Article 25 | Article 30 |
| Article 26 | Article 31 |
| — | Article 32 |
| Article 27 | Article 33, first subparagraph |
| — | Article 33, second subparagraph |
| Article 28 | Article 34 |
| — | Annex I |
| — | Annex II |
| — | Annex III |

On 20 July 2015 the deadline expired for the transposition of the recast Reception Conditions Directive (Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), OJEU 2013 L180/96).

The presentations on which this book is based, were originally given during a seminar on the Recast Reception Conditions Directive. This seminar took place at the Centre for Migration Law (Jean Monnet Centre of Excellence), Faculty of Law of the Radboud University Nijmegen, on Tuesday 8 December 2015.

In light of the very substantial level of interest, we publish a book on the results of this seminar in order to enable those who were not able to attend to benefit from the wealth of knowledge and information which was shared. The book is divided in two sections. The first section deals with the central themes and the problem issues of the recast Reception Conditions Directive. The second part of the book focuses on the implementation of the recast Reception Conditions Directive in a selected number of Member States.

This book offers insight in all the different aspects of the recast Reception Conditions Directive.

Paul Minderhoud & Karin Zwaan (eds)



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